

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

\* \* \* \* \*

UNITED STATES OF AMERICA

v.

18-cr-00192-JL-1

December 7, 2020

IMRAN ALRAI

9:10 a.m.

\* \* \* \* \*

TRANSCRIPT OF EVIDENTIARY HEARING  
BEFORE THE HONORABLE JOSEPH N. LAPLANTE

APPEARANCES:

For the Government: Cam T. Le, AUSA  
John S. Davis, AUSA  
Matthew Hunter, AUSA

For the Defense: Donna J. Brown, Esquire  
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## HEARING

2

## INDEX OF EXAMINATION

WITNESS: JOHN COMMISSO	Page
DIRECT EXAMINATION	
By Ms. Brown	4
CROSS-EXAMINATION	
By Mr. Davis	34
REDIRECT EXAMINATION	
By Ms. Brown	66
RECROSS-EXAMINATION	
By Mr. Hunter	101
REDIRECT EXAMINATION	
By Ms. Brown	114
CLOSING STATEMENT	
By Ms. Brown	151
By Mr. Hunter	198

## HEARING

3

## INDEX TO PRE-MARKED EXHIBITS

DEFENDANT'S	DESCRIPTION	PAGE
EXHIBIT		
A	November 21, 2019 Letter to	
	AUSA Davis	14
Gg	Emails re: updated presentation	62

## HEARING

4

## P R O C E E D I N G S

THE CLERK: The Court has before it for consideration this morning day three of an evidentiary motion hearing in criminal case 18-cr-192-JL, United States of America versus Imran Alrai.

Morning, Judge.

THE COURT: Morning, everyone. I apologize. I'm struggling to kind of master all of the tech that goes on around here to keep us going when the staff is remote or where we're remote. And between the stuff we use to communicate with each other and just the regular email, I find myself groping blindly. So I'm sorry to make you wait so long. Anyway, let's get back underway.

I know we're still with Mr. Commisso, so let's continue.

MS. BROWN: Thank you, Your Honor.

## D I R E C T   E X A M I N A T I O N

BY MS. BROWN:

Q. Good morning, Mr. Commisso.

A. Good morning.

Q. We finished questioning -- I think it was

## HEARING

5

1 Thursday afternoon; correct?

2 A. Yes.

3 Q. Between now and then, have you talked to anyone  
4 about your testimony in this matter on  
5 Thursday?

6 A. So, yes, conversations with some family members  
7 briefly just to let them know that I had  
8 testified for the first time in a case. And I  
9 spoke with my client just to let him know that  
10 we had the hearing and that it was continuing.  
11 I spoke with John Meyer because we needed to  
12 figure out the schedule and his availability.  
13 I did not speak about the substance of my  
14 testimony with John Meyer, but I needed to deal  
15 with scheduling issues.

16 And I spoke with Mr. Davis for the same  
17 reason, which was to talk about the scheduling  
18 of John Meyer's testimony. But we did not  
19 discuss the substance of my testimony.

20 Q. That's your complete -- nothing else?

21 A. Right.

22 Q. And along the same vein, after you testified on  
23 Thursday, did you go back and review any  
24 documents related to this case?

25 A. Yes, I looked at several things since last

## HEARING

6

1 Thursday.

2 Q. Is that because some of the questions made you  
3 think you had to go back and review them to  
4 refresh your memory?

5 A. Well, I guess partly, yes; and partly (audio  
6 interference) -- so I wanted to be fresh again  
7 this morning, as I felt like I was fresh last  
8 Thursday.

9 THE COURT REPORTER: This is the court  
10 reporter. Your answer was somewhat garbled.

11 Will you please try to reconstruct your  
12 answer?

13 THE WITNESS: It is a problem with my  
14 audio connection?

15 THE COURT REPORTER: It is for me.

16 THE COURT: A little bit.

17 You said "partly yes and partly no" to the  
18 question, and then you were explaining.

19 THE WITNESS: Right.

20 So this was reviewing documents. I had  
21 reviewed the documents before Thursday's  
22 hearing, and I felt like I was fresh on  
23 Thursday for testimony. And so since then,  
24 I've reviewed several documents so that I would  
25 feel fresh and have the information fresh in my

## HEARING

7

1 mind for this morning's testimony.

2 Q. (By Ms. Brown) I want to take you now back to  
3 June of 2018. Specifically, the day that  
4 Mr. Alrai physically left the employment of the  
5 United Way.

6 I remember at trial there was a term that  
7 was used, "offboarding"; is that a term you  
8 use, or somebody else might have used that at  
9 trial?

10 A. Well, I didn't testify at trial --

11 Q. Obviously, but I just --

12 A. I'm familiar with it in the employment law  
13 context.

14 Q. But you know what day I'm talking about?

15 A. Well, June 12 was the day that I interviewed  
16 him and he was placed on leave.

17 Q. And that, as far as you know, was the last time  
18 he was ever physically at the United Way  
19 offices; correct?

20 A. Yes. That's correct, as far as I know.

21 Q. And the June 12 date that you just spoke about  
22 -- that was also the date that both you and  
23 Mr. Mulvaney, the Mr. Mulvaney we spoke about  
24 on Thursday -- that was the day that both of  
25 you interviewed Mr. Alrai; correct?

## HEARING

8

1 A. That is correct.

2 Q. And when you set that meeting up, you had that  
3 date in mind. It wasn't sort of a spontaneous  
4 thing.

5 You had coordinated that was the day that  
6 you were going to show up at United Way and  
7 interview him with Mr. Mulvaney; correct?

8 A. We had planned that that was going to be the  
9 day of the interview, yes.

10 Q. And just to go back a little bit.

11 We spoke on Thursday that prior to that  
12 date, meaning June 12, you had already spoken  
13 to the U.S. Attorney's Office at least once;  
14 right?

15 A. At least twice, I guess, yes.

16 Q. And so one of those, as we discussed -- I'm not  
17 going to go into it -- was a meeting about the  
18 allegations of fraud against Mr. Alrai.

19 And there were other contacts regarding a  
20 grand jury subpoena on June 4; right?

21 A. Yes. And I think the first meeting may have  
22 been the one where Rich Vossio and I, together,  
23 met with Mr. Davis and one or two agents, and  
24 really began the discussion of what we  
25 internally had been investigating.



## HEARING

9

1 THE COURT: Let me just say this.

2 I think we are going to have a little bit  
3 of a struggle today with the court reporter and  
4 Mr. Commisso's audio. I don't know if it's  
5 your mic or what's going on, John.

6 You're probably not in the office; right?

7 THE WITNESS: No, I'm at home. It usually  
8 works well, but it's broken up. What I can do  
9 is plug in a headset and see if that works --  
10 if that helps. So just give me one minute to  
11 get the headset.

12 THE COURT REPORTER: Thank you.

13 THE COURT: I'm definitely following, by  
14 the way. I'm hearing it all. It's just that  
15 it's -- I know the reporter's got to be typing  
16 all day...

17 THE WITNESS: I have two children who are  
18 doing their school from home, so they're taking  
19 up the bandwidth right now. But maybe the  
20 headset will help, if you'll just bear with me.

21 THE COURT: How could you let trivialities  
22 like that interfere with what we're doing here?

23 THE WITNESS: Can you hear me through the  
24 headset?

25 THE COURT: About the same so far. Let's

## HEARING

10

1 see how it goes.

2 Could you hear me? Can you hear us,  
3 Mr. Commisso?

4 THE WITNESS: I can hear you clear.

5 THE COURT: It's about the same for now.  
6 Let's just see how it goes.

7 THE COURT REPORTER: And do me a favor.

8 There was a name mentioned in your last  
9 answer and I didn't get the gentleman's name.

10 THE WITNESS: Well, the gentleman I  
11 referred to -- his name is Richard Vossio.

12 Q. (By Ms. Brown) If I recall, you were  
13 describing a May meeting that involved  
14 Mr. Vossio, Attorney Davis, and yourself. I  
15 think -- did I capture -- it was some FBI  
16 agents, you said, were in that May meeting?

17 A. Yeah, at least one agent, maybe two. And that  
18 would have been in June. There were no  
19 face-to-face meetings in May --

20 Q. Thank you for clarifying that.

21 A. -- that I recall.

22 Q. And if we are focusing on June 12 as the day  
23 that you interviewed Mr. Alrai, that meeting or  
24 meetings that you discussed happened before  
25 that date?

## HEARING

11

1 A. Yes. There's an FBI 302 report that will give  
2 you the date when the meeting with Mr. Davis  
3 and Mr. Vossio took place.

4 Q. And I'm not that interested in questioning you  
5 about that right now. I just want to set it in  
6 a context of what happened before the  
7 June 12th, so that's really where I'm going  
8 with that.

9 So back to June 12. You already said you  
10 had set up this meeting for you and  
11 Mr. Mulvaney to meet with Mr. Alrai.

12 Had you coordinated that meeting with  
13 either the U.S. Attorney's Office or the FBI?

14 A. I would not say that we coordinated it. I  
15 would say that we had discussions before the  
16 meeting on June 12 with -- certainly, with  
17 Mr. Davis. I don't recall speaking to anyone  
18 other than Mr. Davis. We discussed a lot of  
19 issues. And to the extent that I was able to  
20 share information with him, I shared  
21 information with him.

22 My memory is he shared very little  
23 information with me because there are rules and  
24 laws that I believe prohibited him from sharing  
25 information with me. So I would not say that

1 we coordinated, but we communicated about a lot  
2 of things before June 12.

3 Q. Well, I guess when I was using the word  
4 "coordinated," it's my understanding when  
5 Mr. Alrai physically left the building of the  
6 United Way, he was greeted by at least one, if  
7 not more, FBI agents. So they would have had  
8 to have known he was going to be there that  
9 day, speaking with you, to greet him.

10 So that's more what I meant by  
11 "coordinated"; not necessarily discussions, but  
12 the fact that the FBI would be there that day.

13 A. So Mr. Alrai, in a typical workday or workweek  
14 -- he was only physically present in Boston on  
15 Tuesdays and Thursdays. And let me just pause.

16 If the audio is really bad, I can also  
17 call in from my cell phone, and we might have a  
18 much better connection if I was speaking  
19 through my cell phone.

20 THE COURT REPORTER: I would not try to  
21 dissuade you from doing that if you think it  
22 will be better. This is the court reporter.

23 THE WITNESS: So do you want to pause  
24 right here and have me dial in through my cell  
25 phone?

## HEARING

13

1 THE COURT: Yeah.

2 Charli, that works; right?

3 THE CLERK: It does. The only caveat is  
4 you should just mute your video so that there's  
5 no echo.

6 THE WITNESS: Yes. So if we can just take  
7 a three-minute pause here, and I'm going to do  
8 some technical work on my end, so bear with me.

9 (Recess taken at 9:29 a.m., and the  
10 proceedings resumed at 9:35 a.m.)

11 Q. (By Ms. Brown) My point was -- in the  
12 questioning we just had was that you had  
13 communicated with law enforcement, be it FBI or  
14 U.S. Attorney, about this meeting on the 12th?

15 A. Yes. I communicated with them. We had -- we  
16 were planning a meeting on the 12th. And I  
17 provided information to law enforcement before  
18 we had that meeting, yes.

19 Q. I'm going to move on to another topic, and we  
20 discussed this a little bit on Thursday. And  
21 that was the letter that you wrote that is now  
22 Exhibit A -- was attached to the Government's  
23 motion, which is document 50.

24 You know which letter I'm talking about?

25 A. Yes.

1 (Pre-marked Defendant's Exhibit A  
2 introduced.)

3 Q. (By Ms. Brown) And I specifically asked you  
4 about a section of that letter where you talked  
5 about trying to get additional -- produce  
6 additional documents from e-discovery regarding  
7 documents that RSM had either reviewed or  
8 assessed. And that's on page 5 of document  
9 50-1-2.

10 Do you remember me asking you some  
11 questions about that?

12 A. Yes.

13 Q. And the one question I neglected to ask you  
14 about that was that either before or after you  
15 wrote that letter, did you communicate to RSM  
16 that you were looking for documents that they  
17 had reviewed or assessed? Or did you do that  
18 search on your own without communicating with  
19 RSM?

20 A. I just want to make sure I understand the  
21 question.

22 Q. Okay. It's a long question. I can rephrase  
23 it, if you like.

24 A. Sure. Go ahead, and I'll try my best to answer  
25 it if I understand the question.

1 Q. Yeah. So it's probably a good start -- so this  
2 letter is dated November 21, 2019, document  
3 50-1-2.

4 And as I said, you had stated in that  
5 letter -- and I'll just read that sentence --  
6 "Nevertheless, UWMB is currently working to  
7 produce any documents from e-discovery database  
8 which RSM reviewed and/or assessed, and which  
9 were not previously produced."

10 So my question about that that I didn't  
11 ask was, did you go on to search for those  
12 documents? Or did you communicate what you had  
13 put in that letter to RSM to ask them to look  
14 for documents that you had described? Or did  
15 you do both?

16 A. So let me answer this way, and hopefully it'll  
17 answer your question.

18 We had a request from Mr. Harrington. I  
19 think we had two requests from Tim Harrington.  
20 And I think by this point, we actually may have  
21 had the motion to exclude Naviloff's testimony.  
22 And, I believe, the final pretrial conference  
23 may have been on November 15. Oh. It's right  
24 here on the first page of the letter.

25 "Final pretrial conference on

1 November 15." There were lots of things that  
2 happened from July to November 21 that were  
3 all -- that were about, in part,  
4 Tim Harrington's request for documents. And so  
5 my focus through this entire process was to  
6 understand what he was requesting and  
7 understand what may need to be produced, to  
8 understand what could be produced in a  
9 reasonable fashion without too much time,  
10 delay, or burden. And, most importantly, as  
11 the representative of United Way, what did I  
12 have access to or control over?

13 So my focus always was, are there United  
14 Way documents that we haven't produced, that  
15 Tim Harrington may be looking for, and what  
16 could we do to produce them? If we're not  
17 going to produce them, why -- I guess is how I  
18 was thinking. So during those months from July  
19 to November, from Tim's -- July is when  
20 Naviloff was retained by the Government.

21 Mr. Harrington started making discovery  
22 requests. He made some in, I think, July,  
23 August, September, and October. He filed a  
24 motion to exclude Naviloff's testimony. Judge  
25 held a final pretrial conference. And during



1 all that time I was focused on what are they  
2 looking for from me with respect to United Way  
3 documents?

4 And while I was focused on that, I was  
5 talking with RSM about documents that they may  
6 have, and I was talking with the Government to  
7 understand what the Government may be looking  
8 for in response to things from us. But the  
9 Government didn't have the documents.

10 So, now, I'm not sure I answered your  
11 question, but I tried to give you context so we  
12 can hopefully get to the answer to your  
13 question.

14 Q. And I think you did not answer my question, so  
15 I'm going to repeat it. And just to be clear,  
16 all I'm trying to find out here is -- you made  
17 this representation in this letter that was  
18 attached to a motion.

19 What did you do -- not the reason you did  
20 it -- what I'm looking for is what you did  
21 towards finding those documents that you said  
22 that you were working to produce -- documents.  
23 So what I don't understand from that sentence  
24 is whether working to produce documents from  
25 e-discovery means that all that happened from

1       that representation is you went and looked at  
2       the e-discovery available to you, or did you  
3       pass along that effort to RSM and ask them --

4               Say, "Hey, can you send me documents that  
5       you reviewed or assessed that had not  
6       previously been produced?" So that's all I'm  
7       trying to find out -- what actions you took  
8       towards that representation.

9    A.    So one piece of it is described in detail in  
10       the letter, which was we had an e-discovery  
11       database. We had produced a whole lot of  
12       documents already.

13           And what I described in the letter was an  
14       effort to find out are there any documents in  
15       that e-discovery database that anyone at RSM  
16       had accessed in any way? And, if so, if they  
17       haven't been produced, let's produce them.

18           So if you just draw a box around the  
19       e-discovery database, any document in that  
20       database that any member of the RSM team  
21       touched in any way -- accessed -- they didn't  
22       have to study it, but they had to click on it  
23       and they had to access it in some way -- all of  
24       those documents were produced as a result of  
25       the work that was done that is described in

## HEARING

19

1           that letter. So that's one piece of it.

2       Q.     And I just want to clarify the term "we,"  
3           because that can be confusing.

4           THE COURT: Which letter now? What's the  
5           date on that letter?

6           MS. BROWN: November 21, I believe. Yes.

7           THE WITNESS: It's marked as Exhibit A.

8           THE COURT: Okay. That one. Yeah.

9       Q.     (By Ms. Brown) So you used the term "we" in  
10           referring to access to the e-discovery.

11           By "we," do you mean you, or you and RSM?

12       A.     I mean me.

13           When I'm talking about contacting Kroll,  
14           the vendor, and saying "how can we find all the  
15           documents that anyone at RSM may have touched?"  
16           That's me. I'm the one calling Kroll and  
17           emailing Kroll. RSM was not involved in that  
18           process at all. It was my e-discovery  
19           database, for lack of a better term. I mean,  
20           it was United Way's database. I was the  
21           e-discovery expert or supervisor, for lack of a  
22           better term.

23           So I'm in a relationship with Kroll.  
24           They're my vendor. So I communicate with Kroll  
25           about the nuts and bolts of how do we find

1           these documents and produce them?

2           THE COURT: We're really having trouble  
3           with the audio now.

4           THE CLERK: I have a suggestion. It might  
5           be easier if you leave the meeting and then  
6           rejoin, just so that you have established a new  
7           connection. It's pretty garbled.

8           THE COURT: You want him to basically --

9           THE CLERK: Leave the meeting and then  
10          just rejoin.

11          THE COURT: I guess give it a try, John.  
12          Try to just terminate and rejoin.

13          THE WITNESS: I'm going to do that, and I  
14          will be back in a minute.

15          (Recess taken at 9:44 a.m., and the  
16          proceedings resumed at 9:47 a.m.)

17          THE COURT: Okay.

18          THE WITNESS: I am back.

19          THE CLERK: Welcome back.

20          THE COURT: You can pose your question,  
21          Counsel.

22          Q. (By Ms. Brown) I think if I clarify what I'm  
23          trying to get at, it might make the answers a  
24          little shorter.

25          What I'm trying to understand from these

1 emails that we've been reading -- it sounds  
2 like RSM has their own internal access to data,  
3 and that you have this e-discovery file that's  
4 managed by Kroll.

5 And what I don't understand -- are they  
6 the same thing? Do you have more? Do they  
7 have less? So that's what I'm not  
8 understanding of -- so here's the issue. You  
9 said you looked in the e-discovery to see if  
10 they accessed it.

11 Did they have their own copy of that that  
12 they could have accessed without you knowing  
13 about it? I guess that's where I'm going.

14 A. So a few things. No, they did not have their  
15 own copy of the e-discovery database. They did  
16 have the ability to access the e-discovery  
17 database, but not at this point in time that  
18 we're talking about.

19 At the time we got close to trial, that  
20 e-discovery database had been taken offline and  
21 nobody had access to it. I had United Way  
22 documents that were not in the e-discovery  
23 database that I had access to. And I assume  
24 and believe that RSM had their own documents in  
25 some sort of document management and document

1 storage system, so I guess their own ability to  
2 do their own searches or to make whatever  
3 efforts they needed to do or felt they needed  
4 to do to respond to the Government's requests.

5 Does that clarify? There are documents in  
6 different places, and different people have  
7 different levels of control over those  
8 documents.

9 Q. And that's what I was trying to ascertain. So,  
10 thank you. That does give a little bit of  
11 clarity.

12 A. Is the quality of the connection any better?

13 THE COURT: No.

14 MS. BROWN: It's not great, but it's a  
15 little better. I think there's kind of a tinny  
16 quality.

17 Q. (By Ms. Brown) I just want to clarify this  
18 point, which is when you put in the letter  
19 that's Exhibit A that you were looking to  
20 produce documents that RSM reviewed or  
21 assessed, part of that effort --

22 It doesn't sound like you sent an email or  
23 made a phone call to RSM saying, "Hey, can you  
24 make sure that I have everything you reviewed  
25 or assessed?" Sounds like you didn't do that;

1 right?

2 A. Well, no, I didn't, because my focus was on  
3 United Way's documents. And I had control over  
4 United Way's documents, even if RSM may have  
5 had similar documents that they received from  
6 United Way.

7 So, for example, the e-discovery database  
8 is one example. I had control over United  
9 Way's documents in the e-discovery database. I  
10 didn't need to talk to RSM to understand what  
11 should be produced from that database.

12 In addition, if RSM asked for documents  
13 from somebody -- just as an example, from the  
14 accounting department, from somebody like  
15 Domenic Pallaria, who was the controller -- if  
16 RSM wanted a copy of a document, a spreadsheet,  
17 a report, a bank statement -- those documents  
18 would come to me so that I could then provide  
19 them to RSM; but also so that I could have a  
20 document collection and management system so  
21 that I would know what I had sent to RSM, and  
22 then I knew that I also needed to send it to  
23 the Government.

24 So I think I'm answering your question,  
25 because I don't need to talk to RSM about what

1 documents they have. Because it's the United  
2 Way's documents, I was confident that I already  
3 had control of those documents.

4 Q. So I think that was a longer way of saying that  
5 my assumption was correct, which is you didn't,  
6 either by email or phone call, contact RSM to  
7 make sure that they had not assessed or  
8 reviewed something that had not already been  
9 produced?

10 A. Well, I think -- let me explain.

11 So in addition to everything else I've  
12 discussed, we did have phone calls. And, in  
13 fact, there are emails that show the series of  
14 folders and names of folders. And I think we  
15 may have talked about it last time how they  
16 shared some of that information with me. And  
17 then we had phone calls.

18 And so the purpose of that -- so in  
19 addition to me feeling confident that I knew  
20 what RSM had from the United Way, we went above  
21 and beyond. We went many steps further,  
22 because I had calls and emails with  
23 Christopher Fitzgerald and Greg Naviloff where  
24 they sent me these names of folders and  
25 described for me the types of documents they



1           had collected.

2                   And we went through them and discussed  
3           them. And I was able to say for some large  
4           number of those documents -- maybe all of them,  
5           I don't remember.

6                   I was able to say "that folder right there  
7           that contains all the reports that  
8           Domenic Pallaria generated from the accounting  
9           department -- I've already produced that. I  
10          have that exact same folder with those exact  
11          same documents. You got these from me."

12                   So we went through a process like that  
13          where together, we tried to figure out "what do  
14          I have for the United Way; and what do they  
15          have?" And when I say "what do they have" --  
16          if they were RSM documents, that was not my  
17          responsibility to produce. My responsibility  
18          only was to weigh in as to the possibility of  
19          attorney-client privilege.

20       Q.       Well, because you had a reviewing status as to  
21          the posttrial discovery production as it  
22          related to United Way, you're familiar that one  
23          of the things that was produced after trial was  
24          a network scan with multiple tabs on it;  
25          correct?

1 A. Yes.

2 Q. And you would also agree with me that while  
3 maybe one or two of those tabs might have been  
4 produced pretrial, that entire network scan  
5 that was produced after trial was not produced  
6 pretrial?

7 A. I don't know all the details, but what you just  
8 described is what I understand. But I'm not  
9 familiar with all the details of that schedule  
10 compared to other schedules.

11 Q. Well, I guess what I'm trying to understand is  
12 how that happened that only part of the network  
13 scan was produced pretrial, and then  
14 afterwards, we find that there are -- there was  
15 more to the file than had been produced  
16 pretrial.

17 So were you part of that, or are you  
18 saying you don't understand how that happened?

19 A. Well, I can tell you what I was part of and  
20 what I understand.

21 Mr. Harrington made a request.

22 And I don't know if he specifically said  
23 "network scan," but something like that. And  
24 so we went -- we took an effort to find  
25 anything that we could produce that was a

1 network scan. And from my perspective, the  
2 effort was, if we have anything like this,  
3 let's find it and let's produce it. He  
4 specifically asked for it, and we wanted him to  
5 have it. That's the approach that we took.

6 And I think he may have asked for it more  
7 than once. So my state of mind was, it seems  
8 like this exists. Let's find it and produce  
9 it. So what did I do? I talked to the people  
10 who might have it. So I spoke with John Meyer.  
11 I probably emailed him as well.

12 And I said, "Do we have something called a  
13 network scan?" And I got a response from  
14 John Meyer.

15 And I believe he sent me a document that's  
16 called a "network scan" or something similar.  
17 And we produced it -- one version of that  
18 before trial, that I believe came from  
19 John Meyer.

20 Similarly, I communicated with RSM and  
21 said, "Tim Harrington is looking for something  
22 called a network scan. Do we have it? Let's  
23 find it and let's produce it."

24 THE COURT: Audio is not happening.

25 Mr. Commisso, let me ask you a question.

1 Are you in a position to go to your office and  
2 do this? Or are you too far away?

3 THE WITNESS: I'm too far away. I'm  
4 trying to think. But my other options might be  
5 from what I have at home. One option --

6 THE COURT: Let's go off the record here.

7 (Recess taken at 9:58 a.m., and the  
8 proceedings resumed at 10:01 a.m.)

9 THE COURT: This is pretty meandering  
10 stuff. If I'm supposed to be getting a lot out  
11 of this, it's not happening.

12 I understand where you're trying to go,  
13 Attorney Brown -- I really do. But this isn't  
14 very straightforward stuff.

15 I don't know why -- Mr. Commisso, why  
16 don't you just answer the questions "yes" or  
17 "no"? You can always explain yourself. But  
18 these answers go on forever. Just answer her  
19 questions. I tell witnesses this all the time,  
20 and you must hear it. You're a trial lawyer --  
21 criminal defense lawyer.

22 Answer "yes" or "no," and then explain  
23 your answer if you need to. But let me just  
24 say, if the situation of your involvement, and  
25 RSM, and United Way, and all the players is

1       supposed to be getting clearer to me, it's  
2       heading in the opposite direction. And that's  
3       not good. So I'd appreciate just some real  
4       straightforward examination and answers to  
5       questions.

6       Q.    (By Ms. Brown) And I will try to focus on what  
7       I'm actually looking for, so you don't have to  
8       give as long an answer, and maybe we can get  
9       right to it.

10       So we were talking about that in the  
11       post-conviction document production, there was  
12       a network scan that had 40-plus tabs on it of  
13       information that had not been produced  
14       pretrial. So I don't need you to describe that  
15       right now. I'm just putting that on the  
16       record.

17       So a minute ago, you described the process  
18       where you tried to, for lack of a better word,  
19       assess what RSM looked at and didn't look at.  
20       Because whatever you had -- any discovery would  
21       be what they had access to, as I'm  
22       understanding this. So we now know that there  
23       was -- like, there was that one network scan  
24       produced pretrial. Now we know there were  
25       multiple other network scans that were produced

1 after trial.

2 So it sounds like you were describing, as  
3 I understood it before we took a break, that  
4 you got those documents directly from  
5 Mr. Meyer; correct?

6 A. So before trial, I got a network scan from  
7 Mr. Meyer. Before trial, there was a second  
8 network scan that I believe came from RSM.  
9 Those were the only two network scans I was  
10 aware of. And now in the last month or so,  
11 there was a third network scan. And I don't  
12 know the history and origin of that network  
13 scan.

14 Q. So you, personally, did not find this third  
15 network scan.

16 It came from some other party?

17 A. I did not, personally, find the third network  
18 scan.

19 Q. And you don't know whether it came from  
20 Mr. Meyer or from RSM?

21 A. When you say "came from," you mean in post  
22 trial?

23 Q. Post trial.

24 A. Somebody found it recently. I don't know for  
25 certain, but I believe it was RSM that

## HEARING

31

1 identified the third network scan that had not  
2 been previously produced.

3 Q. And so can I assume from that that that third  
4 network scan was not in this e-discovery that  
5 we were talking about earlier?

6 A. As far as I know, it was not.

7 Q. That's where I was going with that. Thank you.

8 A. If it had been, then it should have been  
9 produced in the e-discovery process, but I  
10 can't confirm that.

11 Q. But it wasn't produced; correct?

12 A. I don't know. I don't know if it was produced.

13 Q. Just so you know where I'm going with the next  
14 question, I'm going to ask about your contact  
15 with witnesses in this case. And I'm not  
16 asking for detail about what was said, anything  
17 like that. It's just who you had contact with  
18 in preparation for trial.

19 So a lot of the witnesses at trial were  
20 employees of United Way; right?

21 A. Some of them were, yes.

22 Q. And in preparation for trial, you met with and  
23 prepared witnesses who were employed by United  
24 Way for their testimony at trial?

25 A. I met with them to help them prepare for their

1 testimony, yes.

2 Q. Would that apply to every United Way employee  
3 who testified at trial?

4 A. I believe that's correct.

5 Q. Did you either meet with and/or talk to or  
6 email Naviloff in preparation for his trial  
7 testimony?

8 A. I certainly communicated with him. But for the  
9 purposes of preparation, I don't -- I don't  
10 remember meetings with him, and I don't know  
11 that we really had any discussion that I would  
12 characterize as preparing him for his  
13 testimony.

14 Q. And I'm not going to go into a lot of detail  
15 about this. And I asked some questions of  
16 Mr. Naviloff a couple of weeks ago regarding  
17 the October 4, 2018 email regarding --

18 A. Excuse me. I'm going to change my settings  
19 here. Hopefully, we'll have a better  
20 connection here. So just bear with me.

21 So I don't know if that will help or not,  
22 but I thought of one idea that might improve  
23 the connection.

24 So please start your question again.

25 Q. Sure.



1           As I said, I was not going to go into a  
2           lot of detail on this, but a couple weeks ago  
3           when Mr. Naviloff was testifying, I asked him  
4           about an email that you were involved in from  
5           October 4, 2018, where you suggested revisions  
6           to the RSM report.

7           You remember listening to that exchange of  
8           testimony when Mr. Naviloff testified?

9       A.    Yes.

10      Q.   And you agree that as part of that exchange of  
11           ideas on that email, you suggested revisions to  
12           the report, including a suggestion that it be  
13           titled -- or it say that Alrai "executed a  
14           complex fraud scheme"?

15           You remember that email?

16      A.   Yes. It may have already used those terms, but  
17           I made a revision to that portion of the  
18           PowerPoint presentation.

19      Q.   And, in fact, you also suggested including that  
20           "this complex fraud scheme included gaining  
21           trust and deceiving multiple individuals"; that  
22           was part of that same suggestion?

23      A.   Yes, that's what my email said.

24           MS. BROWN: I don't have any further  
25           questions.

HEARING

34

1 THE COURT: Thank you.

2 Cross-examination, Mr. Davis, I assume?

3

4 CROSS-EXAMINATION

5 BY MR. DAVIS:

6 Q. Good morning.

7 Mr. Commisso, you were and are an outside  
8 counsel for United Way on all matters relating  
9 to the Imran Alrai DigitalNet case; is that  
10 right?

11 A. Yes.

12 And I would say -- you said "case," but I  
13 would say all matters. So there were lots of  
14 tentacles and spin-offs.

15 Q. Is your role limited to the criminal case?

16 A. No.

17 Q. And can you summarize briefly the major areas  
18 that are not the criminal case that you have  
19 been working on since the spring of 2018?

20 A. There are many of them, and they are described  
21 in my declaration. But a few of them that come  
22 to mind include dealing with the IRS, the  
23 Massachusetts Attorney General's Office, the  
24 New Hampshire Attorney General's Office, the  
25 annual audited financial statements, the

1 disclosure of those financial statements to  
2 federal agencies and state agencies, responding  
3 to federal and state agencies that provide  
4 funding for United Way's social service  
5 programs, dealing with public relations and  
6 media relations issues, dealing with the  
7 insurance company, dealing with Mr. Alrai's  
8 attorneys before -- separate and apart from the  
9 criminal case, and something called Charity  
10 Navigator, which is a third-party watchdog  
11 group.

12 And I've identified others in my  
13 declaration, but that's a pretty good start.

14 Q. Of all of the total fees that your law firm has  
15 billed United Way, did you calculate the  
16 approximate percentage that relate to the  
17 criminal case?

18 A. Yes. And I don't have it in front of me. It  
19 is in the end of my declaration. But it's less  
20 than 50 percent of my time and fees. And  
21 that's just from my firm -- less than  
22 50 percent concern the federal criminal case.

23 Q. The Court asked in this case to hear more about  
24 the practical effect on the Defense of your  
25 involvement in the prosecution, including in

1 the documents disclosed in discovery.

2 Do you recall that question being asked?

3 A. Yes.

4 Q. What has your role been in the criminal matter  
5 on behalf of United Way?

6 A. Well, I've already talked about the grand jury  
7 subpoena and responding to the grand jury  
8 subpoena. Overall, my responsibility is with  
9 respect to United Way documents. So I want to  
10 make sure that I produce documents in response  
11 to the grand jury subpoena. And  
12 Mr. Harrington, before trial, had a number of  
13 requests, and I did my best to identify United  
14 Way documents that could be produced to the  
15 Government in response to Mr. Harrington's  
16 request.

17 And with respect to RSM documents, my  
18 primary role was to understand privilege issues  
19 and to make sure I protected my client's  
20 interest in not disclosing privileged  
21 information. And there were probably some  
22 other things that I did. But the number one  
23 thing was taking responsibility for United  
24 Way's documents and protecting the privilege.

25 Q. In producing United Way's documents, did you

1 pick and choose among the documents you decided  
2 to produce?

3 A. Yes, in the sense that we had to run search  
4 terms to try to find documents. But when we  
5 found relevant documents, that was the --

6 The picking and choosing was "is this  
7 relevant?" Not "is this good or bad?"

8 "Is this relevant to the issues as I  
9 understand them or as they've been explained to  
10 me?"

11 Q. And can you explain briefly your criteria in  
12 deciding relevance of a United Way document?

13 A. So let's say it was broad in the sense that did  
14 it concern Mr. Alrai, and DigitalNet, and their  
15 dealings together? That's the broad way that I  
16 would describe it -- and the services that  
17 Alrai or DigitalNet provided to United Way, and  
18 who paid for that, and who was involved in that  
19 process from day one through the day payments  
20 were made.

21 So just to give you an example, every time  
22 somebody had trouble with the printer, just  
23 getting a document to print on the printer, I  
24 do not think that was a relevant document.  
25 Because, frankly, we would have never finished

1           discovery if we treated each problem with the  
2           printer as a relevant document.

3                   But, broadly speaking, if it related to  
4           Alrai's services and DigitalNet's services,  
5           then it was relevant.

6   Q.   And did you produce every single relevant  
7       document you identified that was not  
8       privileged?

9   A.   Yes.

10   Q.   And in the posttrial discovery proceedings in  
11       this case, have you become aware of any United  
12       Way document that was exculpatory and that was  
13       not produced before trial?

14   A.   No.

15   Q.   And have you become aware of any United Way  
16       document that, under your relevancy criteria,  
17       should have been produced before trial?

18                   THE COURT:   Look, I really don't -- his  
19       answers and his opinions about these issues?  
20       I've seen documents that are exculpatory that  
21       were not produced before trial.   We've been  
22       talking about them in this hearing.

23                   Now, you might disagree.   And I understand  
24       that, because reasonable minds can disagree.  
25       But Mr. Commisso's opinion about what's

1           exculpatory or what's relevant -- I'm not sure  
2           what I'm supposed to do with that.

3           MR. DAVIS: Your Honor, I beg to differ,  
4           only because I'm not asking about internal RSM  
5           communications. I'm asking specifically about  
6           United Way documents.

7           THE COURT: Oh. Okay.

8           MR. DAVIS: This man has been attacked 500  
9           ways about United Way documents. So I'm just  
10          asking if he's seen anything that should have  
11          been produced from the United Way documents he  
12          produced.

13          THE COURT: Okay. That's a distinction  
14          that does matter.

15          Go ahead.

16          THE WITNESS: So my response to that is  
17          look at every one of the Defendant's filings  
18          after trial, and look at every one of the  
19          attachments to those filings, and there is not  
20          a single United Way document. I'm not talking  
21          about RSM or anyone else's documents. There's  
22          not a single United Way document that supports  
23          the attacks against me. And I, frankly, find  
24          it outrageous.

25   Q.    (By Mr. Davis) I want to ask you about your

1           role in the prosecution.

2                   Were you the puppet master of the  
3           prosecution team in this case?

4   A.   No, I was not.

5   Q.   Did you play any role in the drafting of the  
6           indictment in this case?

7   A.   No, I did not.

8   Q.   Did you play any role in the grand jury  
9           exhibits that were used in this case?

10   A.   No, I did not.

11   Q.   Did you receive any grand jury material in  
12           violation of Rule 6(d)?

13   A.   No.

14   Q.   Did you play any role in the gathering of  
15           documents from the myriad other sources besides  
16           United Way that were collected in this  
17           investigation?

18   A.   No.

19   Q.   Did you have any role in crafting the  
20           Government's exhibit list for trial?

21   A.   No.

22   Q.   Did you have any role in choosing the witnesses  
23           on the 40-person exhibit list the Government  
24           used?

25   A.   No.



## HEARING

41

1 Q. Did you orchestrate the prosecution?

2 A. No.

3 Q. Now let's talk about preservation.

4 First of all, do you recall in the motion  
5 in this case -- the motion to dismiss -- on  
6 page two, the Defense assertion that on June 19  
7 of 2018, Mr. Alrai sent you a message  
8 requesting that you instruct United Way to  
9 "preserve all IT data during the  
10 investigation"; do you recall that assertion?

11 A. Yes, I do.

12 Q. And are you familiar with the letter from  
13 Mr. Alrai's counsel on June 19 of 2018?

14 A. Yes, I am.

15 Q. And did that letter request that you instruct  
16 United Way to "preserve all IT data during the  
17 investigation"?

18 A. No, it did not.

19 Q. In fact, did it have specific requests about  
20 what United Way was supposed to preserve?

21 A. Yes. There were seven or eight bullet points  
22 of specifically identified data.

23 Q. And was one of those bullet points "documents  
24 or correspondence related to any and all  
25 requests for proposal for IT or similar

## HEARING

42

1 technological support services"?

2 A. I believe so. I haven't looked through the  
3 letter in a little while, but, yes. It lists  
4 the documents and data about IT services.

5 Q. And were documents, in fact, preserved?

6 A. Yes. Every item on that list was, in fact,  
7 preserved. And 100 percent, or nearly  
8 100 percent, of those items were, in fact,  
9 produced to the Government.

10 Q. And did that letter -- again, from Mr. Alrai's  
11 counsel on June 19, just one week after he was  
12 walked out -- did that include documents  
13 related to committee meetings that Mr. Alrai  
14 was on?

15 A. Yes.

16 Q. And did it include documents related to  
17 committee meetings where the committee  
18 discussed United Way's IT service providers and  
19 structure?

20 A. Yes, and we produced those.

21 Q. And did it include documents or correspondence  
22 related to all internal investigations, audits,  
23 or reviews of the United Way's IT service  
24 providers, structure, or operations, including  
25 the recent information and audit by CBIZ and

1 MHM?

2 A. So, yes, it requested those. We did not  
3 necessarily produce all of that if it was  
4 privileged. So if it was historic information  
5 before the investigation, we would have  
6 produced it. But if it was --

7 Q. But did you preserve all of that information?

8 A. Yes. Yes, it was all preserved.

9 Q. Did the letter on June 19, 2018, also request  
10 that you preserve documents or correspondence  
11 from, or copying, Mr. Alrai's United Way email  
12 address?

13 A. Yes, we preserved those. And we produced a lot  
14 of them, but not all of them.

15 Q. And did you also -- were you also asked to  
16 produce or preserve documents or correspondence  
17 related to Mr. Alrai's termination, including  
18 Mr. Alrai's employee file and performance  
19 reviews?

20 A. Yes. And, in fact, the employee file and  
21 performance reviews, we produced directly to  
22 Mr. Strauss (phonetic) within, I would say, two  
23 to three weeks of his termination. So that was  
24 a separate production different from the grand  
25 jury production.

1 Q. And so of the items on Mr. Alrai's very  
2 specific preservation letter --

3 THE COURT: Can I interrupt, Mr. Davis,  
4 with a question -- a clarifying question?

5 MR. DAVIS: Yes.

6 THE COURT: Mr. Commisso, when both of  
7 you, Mr. Davis and Mr. Commisso, referred to  
8 the grand jury production just then, what  
9 exactly are you referring to?

10 THE WITNESS: You're asking me?

11 THE COURT: Sure.

12 THE WITNESS: I'm referring to the  
13 documents that I produced to the Government.

14 THE COURT: Right, initially.

15 THE WITNESS: Or throughout the case.  
16 But, yeah, those types of documents we produced  
17 before the original indictment.

18 THE COURT: Yeah. That's what I'm asking.  
19 Okay.

20 THE WITNESS: Yes.

21 THE COURT: I've never been, like,  
22 1,000 percent clear on that, so that's helpful.  
23 Thank you.

24 I'm sorry, Mr. Davis.

25 MR. DAVIS: Quite all right, Judge.

1 Q. (By Mr. Davis) Let's just talk briefly about  
2 what has been preserved at United Way. We  
3 talked about network scans.

4 How many network scans have been  
5 preserved?

6 A. At least three have been preserved and produced  
7 to the Government and the Defendant.

8 Q. So the Defendant has three network scans right  
9 now; is that correct?

10 A. Yes.

11 Q. Pictures or maps of the IT environment -- have  
12 you produced those?

13 A. Yes, to the extent that they exist. And we  
14 also -- to the extent they didn't exist, we  
15 asked Mr. Alrai to either provide them or tell  
16 us where we could find them.

17 Q. And did you make that request almost  
18 immediately after his termination?

19 A. Yes, before the end of June, within two weeks  
20 of his termination.

21 Q. And that was 2018?

22 A. Yes.

23 Q. And did you discover whether Mr. Alrai actually  
24 kept pictures or maps of the IT environment?

25 A. Mr. Meyer, I believe, searched for that

1 information. And he found one piece of paper  
2 hanging in the IT room that just had a list of  
3 computer names, or server names, or IP  
4 addresses. And that was the sum total of the  
5 documentation or map of the IT system.

6 Q. Did you preserve invoices and contracts  
7 relevant to this case?

8 A. Yes, absolutely.

9 Q. Did you preserve emails relevant to this case?

10 A. Yes.

11 Q. Did you preserve PowerPoint presentations?

12 A. Yes.

13 Q. Did you preserve meeting minutes about IT  
14 services of all kinds?

15 A. Yes.

16 Q. Did you preserve virtual desktop sessions at  
17 United Way?

18 A. Yes, for certain key employees who were related  
19 to the IT function.

20 Q. And did you preserve laptops and computers at  
21 United Way?

22 A. Yes, for certain key employees related to these  
23 issues.

24 Q. Did you preserve cell phones?

25 A. Yes.

## HEARING

47

1 Q. And do you know how many?

2 A. I know there were at least two cell phones.  
3 There may have been three. I just don't know  
4 the exact number.

5 Q. Did you preserve servers?

6 A. Yes.

7 Q. And did you preserve websites?

8 A. Yes. And I don't know the technical side of  
9 what that means, but, yes.

10 Q. And did you preserve log-in information?

11 A. I believe so. Of that, I'm not certain. Maybe  
12 that's a question for Mr. Meyer.

13 Q. And at any point, have you suppressed any of  
14 the IT information at United Way that has been  
15 preserved?

16 A. "Suppressed" -- I'm not sure what the meaning  
17 is, but I know the answer is no. So I guess  
18 I'm not sure what you mean. Have I  
19 suppressed --

20 Q. Meaning, have you been aware of an item that  
21 Mr. Alrai was looking for that you had  
22 preserved, that you decided not to turn over?

23 A. No. It was all driven by my obligation. So we  
24 preserved a lot of evidence, and we turned over  
25 a lot of evidence. But we didn't turn over

1 everything, because I was following the rules  
2 as they applied to the United Way of  
3 Massachusetts Bay.

4 Q. Now, we've talked a lot in this case about  
5 your -- or in your testimony about the  
6 assertion of privilege on behalf of the United  
7 Way.

8 Do you recall that?

9 A. Yes, I do.

10 Q. And you have described that you have asserted  
11 privilege, and continue to assert privilege,  
12 regarding the data breach investigation that  
13 RSM was part of after Mr. Alrai was terminated;  
14 is that right?

15 A. Yes, that's correct.

16 Q. And have you made up, recently, that data  
17 breach investigation as a new and different  
18 basis to assert privilege?

19 A. No, it's been asserted since the very beginning  
20 of the engagement.

21 Q. And, just briefly, was the data breach  
22 investigation clearly asserted as a basis of  
23 privilege before the trial in this case?

24 A. Yes, it was.

25 Q. And can you describe briefly how that was done



## HEARING

49

1 and when that happened?

2 A. Well, I guess, at least two things. One is  
3 that I made it clear to the Government that we  
4 considered it privileged, and that we had not  
5 and would not produce documents concerning  
6 that.

7 And then when Mr. Harrington began making  
8 discovery requests in July, we produced  
9 documents. And in at least one of those  
10 documents, there's a reference to the data  
11 security investigation.

12 And then there are about 15 to 20 pages of  
13 a document that are redacted and stamped  
14 "redacted."

15 Q. But you have never provided any privileged  
16 documents related to the data breach  
17 investigation to the Government; is that  
18 correct?

19 A. That's correct. If I had, it would have been  
20 inadvertent. Because I made it clear that I  
21 did not intend to and did not want to provide  
22 any of those documents.

23 Q. And as to the privilege log you recently filed  
24 in this case, there are approximately 300  
25 documents as to which you assert privilege; is

1           that right?

2       A.    Yes, that's correct.

3       Q.    And is the privilege you're asserting related  
4           to the data breach investigation?

5       A.    Well, data breach and, in addition to that,  
6           certain documents concerning the e-discovery  
7           procedures that were in the Kroll database.

8       Q.    But do those relate to Naviloff's loss analysis  
9           at RSM?

10      A.    No. The documents on the privilege log do not  
11           concern -- are not within the scope of  
12           Naviloff's loss analysis.

13      Q.    And are you using the data breach investigation  
14           or the Kroll e-discovery issue as a means of  
15           masking or suppressing relevant information  
16           from Mr. Alrai?

17      A.    No. No, I've been working hard to turn over  
18           everything from the United Way that concerns  
19           Mr. Naviloff's loss analysis. And I'm not  
20           looking to withhold or suppress anything that I  
21           understand somebody's looking for and that it  
22           relates to Naviloff's loss analysis.

23      Q.    You've been accused of "selective assertion of  
24           privilege"; do you recall that?

25      A.    Yes, I do.

1 Q. After you waived privilege with respect to the  
2 RSM loss analysis investigation, were you  
3 selectively asserting privilege?

4 A. No, I wasn't. It's clear, based on everything  
5 that's been produced, we have waived the  
6 privilege regarding the loss analysis, and  
7 we're not using that or any other privilege to  
8 shield documents concerning the loss analysis.

9 Q. At this moment, is there any document that  
10 you're aware of regarding the RSM loss analysis  
11 that is being withheld from Mr. Alrai on the  
12 basis of an assertion of privilege?

13 A. Not that I'm aware of.

14 THE COURT: Well, data security privilege,  
15 though; right?

16 THE WITNESS: Right. But that does not  
17 concern the loss analysis.

18 THE COURT: Right. Understood.

19 When -- Mr. Davis, when you were  
20 questioning a minute ago regarding selective  
21 assertion of the privilege after the waiver,  
22 from your perspective -- I want to be clear on  
23 this -- when did the waiver occur as to the  
24 loss and as to any privilege issues regarding  
25 the loss analysis? Mr. Davis.

1           MR. DAVIS: Your Honor, from the  
2           Government's perspective, there was arguably a  
3           subject matter waiver that occurred in November  
4           of 2018 once we sat down with Mr. Commisso and  
5           Mr. Naviloff. Because we clearly discussed the  
6           findings that RSM had made regarding loss  
7           analysis, including the general sort of  
8           categories that included duplicate billing and  
9           excessive billing, et cetera.

10           And so in my mind, not that I would have  
11           any interest in litigating with United Way, and  
12           not that United Way was being uncooperative,  
13           but that was a subject matter waiver. And I  
14           would guess Mr. Commisso would agree on that.

15           THE COURT: Was it declared understood?  
16           Or is that just your -- if you had to litigate  
17           it, you'd put it in November 2018, when you  
18           started talking about loss analysis,  
19           duplicative billing, overbilling?

20           MR. DAVIS: If the question is to me,  
21           Judge, I probably don't recall accurately.

22           I don't remember that one of us looked at  
23           the other and said, "Okay. This constitutes a  
24           waiver."

25           THE COURT: Sure.

## HEARING

53

1 MR. DAVIS: Mr. Commisso probably  
2 remembers better than I do.

3 THE COURT: Go ahead.

4 MR. DAVIS: Mr. Commisso, do you remember  
5 on that point?

6 THE WITNESS: So my memory is similar to  
7 yours, which is we didn't have a discussion. I  
8 did not, on my own side, brief the issue or  
9 determine what it would mean. I do think that  
10 the November 2018 meeting was the point where  
11 we began to waive the privilege. And it wasn't  
12 until later that we had to figure out what that  
13 meant. And so in July of 2018, when Naviloff  
14 became the Government's expert and  
15 Mr. Harrington requested documents, we then had  
16 to start figuring out where the lines were.

17 What was the scope of the waiver? And it  
18 still -- well, so, it evolved, I guess. We  
19 didn't sort it all out in November. And we  
20 began to really sort it out in July.

21 THE COURT: July of...

22 THE WITNESS: 2019.

23 THE COURT: 2019.

24 Was there a point at which -- because a  
25 waiver is not a small thing; right?

1           Was there a point at which you  
2           acknowledged in your own file, Mr. Commisso, or  
3           with your client, where you said, "Look, our  
4           conduct constitutes a waiver. This is going to  
5           change the way we produce documents to the  
6           Government"?

7           Did that ever get noted anywhere,  
8           acknowledged, either internally or externally,  
9           in your dealings with the Government?

10          THE WITNESS: Internally, certainly, we  
11          discussed waiver issues or privilege issues  
12          from the beginning and throughout as we made  
13          our decisions, and certainly with respect to  
14          sharing Naviloff's work in November, and  
15          certainly with respect to allowing the  
16          Government to hire Naviloff, because I needed  
17          to make sure my client understood what that  
18          meant.

19          So we evaluated the issue and we made sure  
20          we knew what it meant and what the risks would  
21          be.

22          THE COURT: But I guess what I want to  
23          know is -- let me just -- I think I said very  
24          clearly last week that Mr. Commisso didn't do a  
25          thing here, I thought, that was not completely

1       predictable for any lawyer representing a  
2       client, or inappropriate, unethical, unlawful,  
3       or anything of the sort. There's been a lot of  
4       talk about accusations here today. And I guess  
5       one could consider -- Mr. Commisso's outraged.  
6       Mr. Davis is not happy about it, it's clear.

7               But I certainly don't view this as  
8       Mr. Commisso on trial at all. I'm just trying  
9       to understand what happened; okay? I can't  
10      imagine it would have gone much different with  
11      any competent counsel.

12             But is there an acknowledgment -- I mean,  
13      is there a day -- a document on which you said  
14      to your client, "Listen, we've waived" -- or  
15      you wrote in your own file to protect yourself,  
16      right, "This is a waiver"? Or you're  
17      communicating with the Government?

18             Is there a rubicon -- is there an  
19      imaginary line, a date -- some acknowledgement,  
20      internally or externally, about a waiver that  
21      would change the way you dealt with producing  
22      evidence to the Government?

23             THE WITNESS: Yes. So, with respect to  
24      communicating with my client, there are  
25      certainly documents -- and I guess I'm

1       hesitating to say too much about it, because I  
2       need to think about the privileged nature of  
3       those communications. But to your point, yes,  
4       it is very easy for me, in my file, to  
5       pinpoint, because I documented it extensively  
6       exactly how that played out.

7               With respect to communications with RSM, I  
8       believe there will be communications between --  
9       I'm hesitating a little bit because my memory  
10      is vague -- but I expect there would be  
11      communications between me and Greg Naviloff.  
12      Because Greg Naviloff can't turn over documents  
13      or sign a contract with the Government without  
14      me acknowledging that the United Way is going  
15      to waive the privilege. Because if he does --  
16      if he does it without our acknowledgment, he  
17      risks having a liability to the United Way for  
18      disclosing confidential information.

19             So there's a clear record with my client.  
20      There should be a clear record with  
21      Mr. Naviloff. With Mr. Davis, I haven't  
22      thought about what record may exist, but I know  
23      that we talked about the issues. And on  
24      various issues of privilege, he might have  
25      asked me things.



1           Or I might have told him, "Before you talk  
2           to Mr. Naviloff, I need to make sure that I'm  
3           okay with it and my client is okay with it."  
4           So there were communications and different  
5           types of documentation on these issues.

6           THE COURT: Okay.

7           And if you want to stay with the issue,  
8           Mr. Davis, vis-`-vis your client, your office's  
9           dealings with Mr. Commisso or Mr. Naviloff,  
10          feel free to develop it more. It's up to you.

11       Q.    (By Mr. Davis) So I'll say, Mr. Commisso, once  
12           the Government began to deal with RSM and  
13           Naviloff as the Government's expert, did you  
14           assert any impediment to Mr. Naviloff's sharing  
15           fully his work that had occurred, some of it  
16           under United Way's contract?

17       A.    No. No limitations, no impediment with respect  
18           to Naviloff, and the loss analysis, and the  
19           work that he was going to do for the  
20           Government.

21       Q.    So the Government could and did communicate  
22           freely with Naviloff after it hired him in July  
23           of 2018; correct?

24       A.    Right. And, in fact, my role at that time was  
25           essentially something close to zero, unless it

1       dealt with documents that Mr. Harrington  
2       needed, or maybe Naviloff and the Government  
3       needed that I might be able to provide --  
4       United Way documents. But, otherwise, I was  
5       not a participant in the Government's  
6       relationship with Greg Naviloff.

7       Q. I just have a few more questions. I want to  
8       ask you about internal RSM emails; that is,  
9       emails within RSM, among the employees of RSM,  
10      including Naviloff and other personnel.

11             You've seen those in the posttrial  
12      discovery; correct?

13      A. Yes.

14      Q. Did you ever ask for all of those emails to do  
15      a comprehensive review prior to trial?

16      A. No.

17      Q. Why not?

18      A. It never occurred to me. I can't think of any  
19      reason why I would want them. It just -- it  
20      never crossed my mind, and I can't think of a  
21      case in 20 years where I may have asked for  
22      something like that.

23             THE COURT: That last part of the answer  
24      makes me think I misunderstood the question.

25             What was the question again, Mr. Davis?

## HEARING

59

1 MR. DAVIS: The question was whether  
2 Mr. Commisso requested from RSM all of its  
3 internal email communications at any point.

4 THE COURT: Okay. Yeah.

5 MR. DAVIS: May I proceed, Your Honor?

6 THE COURT: Give me a second.

7 No, go ahead. Thank you.

8 Q. (By Mr. Davis) Were there, before the trial in  
9 this case, significant requests for some RSM  
10 emails from Mr. Alrai?

11 A. Yes, I believe there were.

12 Q. And were there, in fact, RSM emails that were  
13 produced, prior to the trial, to Mr. Alrai?

14 A. Yes, there were.

15 Q. And did you play a role in reviewing those  
16 emails?

17 A. Yes, if they concerned United Way employees --  
18 for example, John Meyer.

19 Q. And were you directly involved in the discovery  
20 litigation just before trial -- that is, in the  
21 October and November 2019 time frame?

22 A. Yes. Yes, I was.

23 Q. And was it in that context that you filed  
24 Defense Exhibit A, your six-page letter that  
25 detailed exactly what you were doing in this

## HEARING

60

1 case?

2 A. Yes, that's exactly right.

3 Q. And in connection with that litigation, did  
4 Mr. Harrington, the counsel for Mr. Alrai, ever  
5 ask for every internal RSM email in this  
6 engagement?

7 A. No, not that I understood, or not that I'm  
8 aware of. And that certainly was not the focus  
9 of the actual issues being litigated before the  
10 Court.

11 Q. And to your knowledge, was any such request --  
12 again, for every internal RSM email about this  
13 engagement -- was that ever made prior to  
14 trial?

15 A. No. The first time it came up was a year  
16 later, in August and September of 2020.

17 Q. And in your communications with Mr. Naviloff,  
18 at any point, did Mr. Naviloff indicate to you  
19 that there might be RSM emails that could be  
20 used to impeach him at trial?

21 A. No. We never discussed that.

22 Q. And in your communications with Mr. Naviloff,  
23 did Mr. Naviloff ever tell you that there might  
24 be internal RSM emails that contained  
25 exculpatory information to benefit Mr. Alrai?

## HEARING

61

1 A. No, he never told me that.

2 Q. So were you doing anything to suppress or  
3 prevent the disclosure of RSM internal emails?

4 A. No.

5 Q. And, in fact, as you said, it never occurred to  
6 you to request every RSM email in the  
7 investigation; is that right?

8 A. That's right.

9 Q. And just one last question.

10 In dealing with -- well, have you dealt in  
11 the past with forensic accounting consultants  
12 who may be expert witnesses in litigation?

13 A. Yes, I have.

14 Q. And in any of those engagements, has it ever  
15 been part of your practice to collect and  
16 review every single internal email at that  
17 forensic accounting consultant firm to review?

18 A. No, it's not been part of my practice. And, in  
19 fact, it's sort of the last thing that I would  
20 ever expect happening.

21 What we do focus on, in civil and criminal  
22 litigation, is the -- what I call the raw  
23 material, or the original source documents that  
24 go to the expert. And you want to know what  
25 those are so that you can then provide them in

1 discovery. But the underlying business records  
2 and source documents -- the idea of producing  
3 internal emails or internal work product is not  
4 something that I've ever been involved in.

5 So, no, I would not have been thinking  
6 about it in this case.

7 Q. I want to ask you just briefly about the  
8 "fruitful" email, which is Defense Exhibit Gg.

9 Is that something that -- I'm not even  
10 sure -- Tracy, if you're on, can we call up  
11 Exhibit Gg?

12 THE CLERK: Yep. Just give me a moment to  
13 share my screen.

14 (Pre-marked Defendant's Exhibit Gg  
15 introduced.)

16 Q. (By Mr. Davis) You recognize that email to  
17 Mr. Commisso?

18 A. Yes. I've seen this recently.

19 Q. And this is the email that includes the -- at  
20 the very bottom, the bullet "the trending of  
21 total United Way budget versus IT budget was  
22 not fruitful"; do you see that?

23 A. Yes.

24 Q. Do you recall that in a motion the Defense  
25 filed in this case, on page five, in referring

1 to this same email, the Defense said that the  
2 "new email revealed a discussion about an  
3 earlier version of RSM's report where the RSM  
4 team decided to leave out a chart that showed  
5 that there was no significant change in IT cost  
6 during Alrai's DigitalNet's tenure because it  
7 was not fruitful"; do you recall that being in  
8 the motion?

9 A. Yes. Yes, I do.

10 Q. And, of course, Mr. Naviloff being questioned  
11 about that same document; do you remember that?

12 A. Right. And I remember the first time I read  
13 that motion.

14 And immediately my response was, "No,  
15 that's not true."

16 Q. And, in fact, is it true?

17 A. No, it's not true.

18 Q. And why is it not true?

19 A. Well, because if you go to Exhibit Z, which is  
20 a report prepared by RSM in October of 2018 --  
21 it was presented to the special committee just  
22 four days after that email -- and you turn to  
23 page, I want to say, 58 and 59, you will see  
24 that there are two charts and a whole lot of  
25 narrative about the IT budget and how it

1 changed over time.

2 Q. Right.

3 And included on page 59 of that same  
4 exhibit, you recall the sentence that "total  
5 functional expenses for United Way and IT  
6 expenses each increased by 7 percent over the  
7 period FY13 through FY17"; do you recall that?

8 A. Yes, I do.

9 Q. Do you recall further that the same note in the  
10 same exhibit at page 59 said that IT  
11 expenditures did not grow at a higher rate than  
12 total expenses; do you recall that?

13 A. Yes, I do.

14 Q. So was there anything that the RSM team was  
15 concealing from the special committee about  
16 these facts?

17 A. No. They obviously put the facts in the  
18 report. There were two pages of those facts.  
19 And as I remember the presentation or  
20 understood the point of it, this information  
21 helped to explain how Alrai was able to keep  
22 the crime going for so long without being  
23 detected.

24 Q. So is the comment about things not being  
25 fruitful in Exhibit Gg -- is that part of some



1 deliberate effort to withhold exculpatory  
2 information from Mr. Alrai?

3 A. I don't see any evidence of that, and I'm not  
4 aware of any effort -- deliberate or joint  
5 undertaking, or anything like that, to withhold  
6 exculpatory evidence. And I see no evidence of  
7 it.

8 Q. So, Mr. Commisso, just to summarize, in your  
9 role as United Way counsel in this engagement,  
10 have you done anything to suppress evidence,  
11 that you're aware of, that's favorable to  
12 Mr. Alrai?

13 A. No, I have not.

14 Q. Have you destroyed evidence or failed to  
15 preserve evidence in violation of any request  
16 or duty that you were aware of?

17 A. No, I have not.

18 Q. Have you selectively produced documents so as  
19 to choose documents that harmed Alrai and to  
20 hide documents that help him?

21 A. No, I have not.

22 Q. And have you manipulated United Way's privilege  
23 so as to deprive the Defendant of evidence that  
24 he's entitled to?

25 A. No.

## HEARING

66

1 MR. DAVIS: No further questions.

2 THE WITNESS: There are two issues that I  
3 think need clarification.

4 THE COURT: Well -- okay. Proceed.

5 MS. BROWN: Are you allowing him to make a  
6 statement?

7 THE COURT: I would allow him to make a  
8 statement, but if you'd prefer to examine him,  
9 Attorney Brown, before he does, I'm fine with  
10 that.

11 MS. BROWN: I would prefer to do that.

12 THE COURT: That's perfectly fine, and I  
13 should have asked you first. I'm sorry about  
14 that.

15 MS. BROWN: Thank you.

16

17 REDIRECT EXAMINATION

18 BY MS. BROWN:

19 Q. Mr. Commisso, one of the questions the  
20 Government asked you was whether you were aware  
21 of any documents -- I don't know if you used  
22 the word "owned" or "possessed" -- by United  
23 Way that were not produced and were  
24 exculpatory; you remember that question?

25 A. Yes.

1 Q. And so I want to go back to -- you and I  
2 discussed this earlier -- is the network scans  
3 that were produced in this case. And the  
4 Government asked you about it.

5 And as of at least this date, there's been  
6 three of them; correct?

7 A. I'm aware of three.

8 Q. But one of those three was produced after  
9 trial -- the most recent one?

10 A. Yes.

11 Q. And I think I neglected when I was asking you  
12 earlier about this -- just for the record, that  
13 document is UUU -- U as in "under" -- and it's  
14 actually an Excel spreadsheet.

15 Would you agree with that description of  
16 what I'm talking about as to the third network  
17 scan?

18 A. I know it's a spreadsheet. I don't know what  
19 the exhibit number is, but present whatever you  
20 want as the exhibit number.

21 Q. Well, I guess I'm going back to that because as  
22 I understood your testimony, you're saying that  
23 there was nothing that United Way possessed  
24 that was exculpatory, or even potentially  
25 exculpatory, that you, as United Way, did not

1 turn over prior to trial.

2 Did I understand your testimony correctly  
3 on that?

4 A. Yeah. I was not aware of anything that we  
5 didn't turn over prior to trial that we were  
6 required to. And now, after a year of  
7 additional discovery, I'm not aware of  
8 additional documents that have now been turned  
9 over after trial that are exculpatory with  
10 respect to United Way's documents.

11 Q. And this is where I'm going with this.

12 That network scan -- we'll refer to it as  
13 the third network scan produced after trial --

14 A. Yes.

15 Q. -- would you consider that a United Way  
16 document?

17 A. I don't know the answer to that because I don't  
18 know enough about the history of that document.

19 I can tell you that before trial, I never  
20 saw or heard of that document, and that after  
21 trial, it was my understanding that RSM  
22 produced that document.

23 Q. In terms of your previous testimony, where at  
24 least I understood it that you and RSM had an  
25 identical batch of discovery that you had

1 access to, that just wouldn't be true if they  
2 produced something after trial that you didn't  
3 have; right?

4 A. Well, no, no, they have their own internal RSM  
5 documents. You know, if they go on the web and  
6 they do some market research where they talk to  
7 a different department within RSM, they collect  
8 their own documents. I don't have access to  
9 them.

10 If they're United Way documents and I  
11 provide them to RSM, then I've got my own set  
12 and I've provided a set to RSM.

13 Q. But what we're talking about is a network scan  
14 of the United Way computer system -- IT  
15 system -- in the summer of 2018.

16 You would agree with me, if that's an  
17 accurate description of this document, that  
18 that's a United Way document; right? No matter  
19 where it came from, it originally came from the  
20 IT system of the United Way?

21 A. Well, yes. I guess it's a question of  
22 possession; right?

23 So I don't know the history -- the  
24 provenance of that electronic file. I don't  
25 know who has control over it, where it resides.

1 I know I didn't get it. So I didn't have it in  
2 my collection of documents. And I didn't -- as  
3 far as I recall, I did not send it to Kroll --  
4 to the e-discovery database. And I did not  
5 receive it, so I did not send it to RSM.

6 So if it originated at United Way and made  
7 its way to RSM, then I don't know how that  
8 happened. I was not in the chain of  
9 communication in that scenario.

10 Q. And that goes back to my previous question.

11 That when you made the representation to  
12 the Court about what documents from United Way  
13 were going to be produced, just checking your  
14 e-discovery database wouldn't have captured  
15 that; correct?

16 A. No, which is why we did additional steps -- we  
17 took additional steps.

18 Q. And that's what I was trying to get at before.

19 Those additional steps did not include  
20 either picking up the phone or sending an email  
21 to Naviloff and saying, "I'm just making this  
22 representation to the Court that the Government  
23 and the Defendant have everything that you've  
24 reviewed or assessed. Just want to make sure  
25 that's true."

1                   You didn't do that?

2       A.    No, in fact, we did do things like that.

3                   So when I say there are multiple things we  
4       did to verify, one thing would be for me to  
5       contact John Meyer and ask John Meyer, "Do you  
6       have these two or three categories of  
7       documents?"

8                   And another thing that I did is I worked  
9       with Greg Naviloff and Chris Fitzgerald. And  
10      there are those emails that show that list of,  
11      like, 15 folders that they want to discuss with  
12      me.

13                  And so that was a check on -- that was our  
14      way of being comprehensive, so that I could  
15      see, "Okay. They've got the four folders that  
16      look like documents I gave them, and so I'm  
17      confident that I've already produced those four  
18      folders." Well, then they've got eight other  
19      folders. I don't know what's in those folders,  
20      because they control them.

21                  And so we're talking through the issues  
22      together to see if we missed a United Way  
23      document that I should be aware of that I know  
24      that I have to produce it.

25                  THE COURT: We need to give the reporter a

1 break.

2 So let's take -- you can continue after  
3 this, Attorney Brown, but let's take the  
4 15-minute break. We'll reconvene at 11:15.  
5 I've got to make a phone call on a case, but  
6 I'm going to do it right now so it doesn't drag  
7 into beyond 15 minutes.

8 (Recess taken at 10:59 a.m., and the  
9 proceedings resumed at 11:16 a.m.)

10 Q. (By Ms. Brown) Before the break, we were  
11 talking about this third network scan that was  
12 produced post conviction that you did not -- I  
13 want to choose the right word -- have access  
14 to, see, or at least was aware of prior to  
15 trial; correct?

16 A. I was not aware of it, yes.

17 Q. And I'm going to describe it how I at least  
18 view this document, and correct me if your  
19 understanding is different.

20 But I am describing it as an Excel  
21 document. And at the bottom of it, there are  
22 different tabs for -- and I don't even know  
23 what the tech term is for it -- like, different  
24 files, but you can access different tabs.

25 If I told you there were 40-plus tabs in



1           this Excel document produced post trial, would  
2           that sound about right?

3       A.    It does, but I'm really not familiar with the  
4           document, other than I know it exists.  So I'm  
5           not the best person to investigate the number  
6           of tabs.

7       Q.    And, again, just for the record, it's -- UUU is  
8           the document that I'm talking about.  I just  
9           want that to be clear, because it is an  
10          exhibit.

11               Well, the reason I ask about it is the  
12           Government asked you if you were aware of any  
13           documents that came from United Way that were  
14           produced after trial that contained either  
15           exculpatory or potentially exculpatory  
16           evidence.  And so it sounds like you're not  
17           aware of whether that document contains either  
18           exculpatory or potentially exculpatory  
19           evidence; would that be a fair assessment?

20       A.    That is a fair assessment.  And I guess I don't  
21           know whether that document ultimately came from  
22           the United Way.  So I did not have that  
23           document in mind, because I don't know if it  
24           came from the United Way and I don't know if it  
25           contains exculpatory evidence.

1 Q. But let's just say, hypothetically, it purports  
2 to come from United Way at some point.

3 If it purports to be a network scan of the  
4 network at United Way at some point in time, at  
5 least at some point, it came from United Way;  
6 right?

7 A. If it came from John Meyer -- if John Meyer ran  
8 the network scan and then he sent that network  
9 scan to RSM, which is possible, I would not  
10 have received it. I would not have put it in  
11 the e-discovery database. I would not have  
12 produced it myself.

13 So, then, yes, that would come from United  
14 Way. If RSM created it, then maybe I would  
15 think of that as RSM work product and not a  
16 United Way document. It's just -- that's where  
17 I make a distinction. I don't know if that  
18 distinction matters to you, but there's a  
19 difference between United Way's documents that  
20 John Meyer creates and RSM work product --  
21 something they create as they're doing their  
22 work. That's all.

23 Q. And you would agree with me, if RSM was, for  
24 lack of a better word, doing their work, and  
25 they were doing that work for United Way

1 through the summer, fall, and early winter  
2 2018/2019, those documents really belong to  
3 United Way; right? United Way through -- you  
4 hired them; right?

5 A. So I think it's a technical issue that I can't  
6 say "yes" or "no" to. If they create their own  
7 internal work product, then I would not say  
8 those are United Way documents. Whether it's a  
9 spreadsheet they create, or notes, or a memo  
10 that they create for their own internal  
11 purposes and they put in their own internal  
12 files, I don't consider that, for the purposes  
13 of this discussion, to be a United Way  
14 document.

15 What I think of when I say a "United Way  
16 document" is an email that comes off of our  
17 email server, or an invoice, or a contract --  
18 something that can be found in the files of the  
19 United Way.

20 Q. And as I said, because you haven't really  
21 reviewed this network scan, Exhibit UUU, you  
22 can't say that, if it did come from United Way,  
23 that it doesn't contain exculpatory evidence?

24 A. I have not reviewed the document. I don't know  
25 what it contains. I have a general

1 understanding of the document. And I'm not in  
2 a position to draw lines between what's  
3 exculpatory and what's not. You've got one  
4 definition. I've got -- I'm sure I have a  
5 different definition in my mind.

6 Q. Well, we heard on Thursday that anything that  
7 relates to the work that RSM did for United  
8 Way, if it's going to get produced to the  
9 Government, it had to go through you so you  
10 could vet it for privileged information.

11 Did I understand that testimony correctly?

12 A. Well, that's probably too broad. But if it  
13 relates to Naviloff's loss analysis and relates  
14 to his loss analysis for United Way, then I  
15 would want to do a privilege review of those  
16 documents. If it concerned the Government's  
17 work -- Naviloff's work for the Government,  
18 then I wouldn't do a privilege review of those  
19 documents.

20 Q. Well, what I'm getting at is that there was a  
21 much smaller version of this network scan given  
22 prior to trial. And what I'm getting at is, if  
23 I understand this process, it would have gone  
24 through you for a review to see if it contained  
25 privileged information.

1 A. Possibly, although the nature of this document  
2 -- I'm not even sure what I would review. It's  
3 a report, as I understand it. So one version  
4 of it -- the first vision of it came from  
5 John Meyer. He sent it to me. I looked at it  
6 and I produced it in the sense there was some  
7 privilege review, but there's really no content  
8 that I can review for privilege so -- or  
9 produce.

10 Q. Well, it talks about things like passwords and  
11 security.

12 I mean, those are things you'd want to be  
13 looking at; right?

14 A. That's not attorney-client privilege. That's  
15 more confidentiality. That's why we have the  
16 protective order in place.

17 Q. But what I'm getting at is that -- and it  
18 sounds like you're saying "yes" to this, but I  
19 just want to clarify.

20 The much smaller version of this, which  
21 was just one tab of this network scan that was  
22 produced pretrial -- that came through you  
23 first to do some sort of review for privilege  
24 analysis?

25 A. Yes. So let me try to be clear.

1           There were two versions produced before  
2           trial. One of them certainly came from  
3           John Meyer. I certainly obtained it and  
4           reviewed it, and I was responsible for  
5           producing it.

6           The second version -- I don't recall, as I  
7           sit here right now, who produced that. If  
8           John Meyer produced it, that means I produced  
9           it. If RSM produced it, then I might not have  
10          seen it before trial -- or before it was  
11          produced. I just don't know. I just don't  
12          recall the chain of custody, or whatever you  
13          want to call it, with respect to the second  
14          network scan.

15       Q.   And as to the third one, did it have to go  
16           through you first to be produced, or you've  
17           never seen it?

18       A.   I think -- I saw it after it was produced. So,  
19           no, it didn't go through me before it was  
20           produced.

21           MR. HUNTER: Your Honor, I don't mean to  
22           interrupt, but if it's helpful, I could proffer  
23           how the Government received these three network  
24           scans, if it would help.

25           MS. BROWN: I'm fine with that.

1           THE COURT: You can proffer it, but -- I  
2           guess I'm going to have you proffer it so you  
3           can -- it might help the witness remember.

4           But after this hearing, I'm going to ask  
5           for a timeline to be created about every  
6           discovery request, and order, and production,  
7           from the beginning of this litigation through  
8           where we were now. Because there's just too  
9           much to keep track of and too much to  
10          distinguish from.

11          By the way, Mr. Commisso has answered, I  
12          thought, very appropriately a minute ago when  
13          he said, "Look, what you think is exculpatory  
14          is different things." It's a very reasonable  
15          position.

16          But that's why I didn't understand the  
17          questions from the prosecution about "did you  
18          withhold exculpatory evidence?"

19          That's not for the witness to decide.  
20          That's not for anyone to decide except me. And  
21          although I do appreciate the distinction, and  
22          it's very important, between United Way  
23          documents and RSM work product -- because I  
24          don't think there was a discovery allegation to  
25          produce RSM work product, except possibly a

1 Brady obligation.

2 But it's a very fuzzy, gray area here,  
3 because there's a question about whether the  
4 prosecutors would have thought of it or had  
5 the -- it's just not a normal situation. We've  
6 got to explore it and we're -- frankly, we're  
7 spending way more time on -- for three days --  
8 and I know you have a burden to meet,  
9 Ms. Brown. This is not a criticism.

10 But we're spending tons of time on RSM,  
11 and United Way, and their counsel, when I think  
12 the real questions here are for the  
13 prosecutors. That's what I think. And I don't  
14 know when we're going to -- I guess I'm just  
15 going to have some questions for them myself.  
16 I don't plan on putting anybody on the witness  
17 stand, but you're all officers of the court.  
18 And I know you're going to answer me  
19 truthfully, but that's what the real questions  
20 are here.

21 Because there's a difference between  
22 Mr. Commisso representing a victim and how he  
23 would approach issues, and how he would  
24 approach them if he was, frankly, defending an  
25 accused. It's not really the same thing.



1           So go ahead and make your proffer,  
2           Mr. Hunter, and try to make it succinct and  
3           clear, please.

4           MR. HUNTER: I will. And if the Court has  
5           questions later or after this witness, I can  
6           fill in.

7           But, in essence, before trial,  
8           Mr. Harrington is requesting information about  
9           the IT environment. We learned that John Meyer  
10          had run a network scan, and that there might  
11          also be a network scan that RSM had. We asked  
12          for them and we got them. One was a 62-page  
13          PDF that was produced before trial. The other  
14          is this one-page Excel spreadsheet that  
15          Ms. Brown is referring to.

16          During this litigation -- and I make a  
17          note of it in our surreply, I think -- during a  
18          discussion with RSM, we realized that the  
19          one-tabbed Excel spreadsheet was only part of  
20          the larger scan that they did. And so I asked  
21          for it. They produced it to us. And we  
22          produced it to the Defense. And my  
23          understanding was -- because through the  
24          pretrial proceedings, our understanding was we  
25          had received all network scans and had produced

## HEARING

82

1           them. So when I learned there was this larger  
2           network scan that RSM had, we produced them.

3           And that's the basic understanding of  
4           where the Government got them and the timeline  
5           of production. There were two produced before  
6           trial. And this one larger one we produced  
7           after trial as soon as we learned about it.

8           THE COURT: Thank you.

9           MS. BROWN: Thank you, Your Honor, for  
10          clarifying that.

11       Q.    (By Ms. Brown) And during your questioning by  
12           Attorney Davis, if I understood this correctly  
13           or wrote it down correctly, I understood that  
14           you said that prior to trial, you did not  
15           assert a privilege as to the work done by  
16           Mr. Naviloff; did I understand that answer  
17           correctly?

18       A.    Well, we had waived the privilege with respect  
19           to the loss analysis -- Mr. Naviloff's loss  
20           analysis. So at that point, there was no more  
21           privilege. But we also hadn't litigated the  
22           scope of that. So I guess I'm not sure what --  
23           well, maybe you have another question.

24       Q.    I do. I didn't want to misstate what you had  
25           said. So I wanted to understand what you said

1 first, and it sounds like I did understand it  
2 correctly.

3 My question as a follow-up to that was you  
4 would agree with me, and I'm not going to go  
5 through it all again -- we talked about this  
6 last week -- there were several emails  
7 involving Mr. Naviloff's loss analysis that you  
8 had redacted because you felt they also  
9 contained information relative to data  
10 security, and we brought some of those up on  
11 the screen last week that were emails that were  
12 produced.

13 So they weren't held back under the  
14 privilege log, but they had a notation of  
15 "redacted" on them. You remember there were  
16 some of those emails last week; right?

17 A. Yeah. So you're now -- there's some moving  
18 parts there.

19 So you first asked me a question about  
20 before trial; right? And about the use of  
21 privilege before trial. But now when you're  
22 talking about those redacted documents, those  
23 are all produced in August and September, maybe  
24 October, of the year after trial; right. So I  
25 just want to make sure we're talking about the

1 same period of time and the same --

2 Q. Correct.

3 I guess my question is that you're still  
4 asserting the privilege as to some of the  
5 emails involving Mr. Naviloff; correct?

6 A. The portion of those emails that contain  
7 information that is only related to the data  
8 security investigation.

9 Q. But you're still asserting privilege as to some  
10 of the emails involving Mr. Naviloff?

11 A. Yes.

12 Q. And, in fact, we talked about it last week --  
13 let me get the document number -- the privilege  
14 log that was produced after trial -- many, if  
15 not most, of those emails also have  
16 Mr. Naviloff's name either -- that it's to him  
17 or he's cc'd on those emails.

18 So you are still asserting some form of  
19 privilege as to emails involving Greg Naviloff;  
20 correct?

21 A. Yes, because the scope of the Judge's order was  
22 to produce only those documents related to  
23 Naviloff's loss analysis. And in addition to  
24 that, I had to redact or withhold privileged  
25 information regarding the data security

1 investigation.

2 Q. Well, I just wanted to -- it wasn't clear from  
3 the question from Attorney Davis.

4 But I wanted to clarify that you are still  
5 asserting privilege as to some of the work  
6 Naviloff did in this case in terms of emails  
7 relating to his discussion of this case with  
8 his team members at RSM.

9 A. Yes, but I just want to make sure we're clear.

10 The content of those privileged documents  
11 do not relate to the loss analysis.

12 Q. And that's as to the documents that are in the  
13 privilege log; right?

14 A. And also the ones that have been marked as  
15 redacted.

16 And I also want to make clear -- there is  
17 no motion, or letter, or any other  
18 communication where you have challenged any of  
19 those redactions that you showed me the other  
20 day.

21 Q. You would agree with me, it's hard to tell it's  
22 a redaction if you can't see the document,  
23 isn't it?

24 A. Well, you challenged the privilege log. And so  
25 you could -- I'm not going to tell you how to

1 do your job, but there are things that you  
2 could do.

3 Q. Now, Attorney Davis -- and my notes indicate he  
4 asked you the question that you have never  
5 produced data breach investigation to the  
6 Government; do you remember that question?

7 A. We have always asserted the privilege with  
8 respect to the data security investigation.  
9 And, therefore, we have never produced or  
10 disclosed any documents concerning the data  
11 security investigation.

12 Q. But we now know, because of your assertion of  
13 the privilege on this, that Naviloff, in some  
14 way, shape, or form, had access to information  
15 relative to the data breach investigation  
16 because you've asserted privilege as to his  
17 emails regarding this?

18 A. So, correct, he was on emails that -- he was on  
19 emails that contained privileged information  
20 regarding the data security investigation. He  
21 was not part of the DFIR team, but the two  
22 teams both worked at RSM. And, sometimes, two  
23 teams were together on the same emails.

24 Q. Now, one of the questions -- the -- well,  
25 actually I forgot to come back to this. I had

1 one more question regarding the network scan we  
2 were talking about, which is document Uuu.

3 Do you recall being on an email exchange  
4 where this network scan was discussed?

5 A. No, I don't remember that email.

6 Q. If I told you there was an email from  
7 August 13, 2018, where you were copied, where  
8 the subject line is "additional network device  
9 scan, privileged and confidential," you don't  
10 have a recollection of that email?

11 A. I do recall emails in August of 2018 about the  
12 network scan. I just -- yes, I recall,  
13 generally, there were emails.

14 Q. And so you may have had access to the network  
15 scan being on this email chain back in August  
16 -- between August 13 and August 15 of 2018?

17 A. I had access to that email discussion. I did  
18 not have access to the network scan.

19 Q. So if there were an email from Ryan Gilpin  
20 where he put a link into the scan saying "you  
21 could navigate here," and then has the  
22 hyperlink, "and download and run and file and  
23 screenshot below."

24 You don't remember him sending a link to  
25 access to that network scan?

1 A. He sent that to John Meyer at the time. I had  
2 no memory -- paid no attention to it. I only  
3 know about it because I've seen it over the  
4 last week or two.

5 Q. And so -- you're correct. So that's an email  
6 chain between Ryan Gilpin and John Meyer.

7 And you and several other members of RSM  
8 are on that chain; correct?

9 A. I don't have it in front of me.

10 Q. One of the questions Attorney Davis asked you  
11 is whether trial counsel specifically asked  
12 for, and to quote Attorney Davis, "every single  
13 internal email from RSM."

14 And you answered "no," that trial counsel  
15 did not ask for that.

16 Remember that exchange?

17 A. Yes.

18 Q. Do you remember defense counsel prior to trial  
19 asking for all documents and data collected and  
20 reviewed by RSM in calculating United Way's  
21 loss?

22 A. That sounds similar to the language in one of  
23 the discovery requests.

24 Q. In fact, that -- it wasn't one of the discovery  
25 requests, but it's also in the actual motion to



1 exclude Naviloff, document 27, page two.

2 And do you also remember that trial  
3 counsel also asked for any reports prepared by  
4 Mr. Naviloff, RSM, and its employees?

5 A. So with respect to those two issues, what I  
6 remember is I had -- I had a duty or a role,  
7 which was to focus on United Way's documents.  
8 So with respect to your first question about  
9 RSM emails, I don't really have much knowledge  
10 or more to say that I haven't already said  
11 because I was focused on United Way's  
12 documents.

13 And on the second part of what you said,  
14 he -- I don't think you read the entire  
15 request. Because what I remember is, he was  
16 looking for reports that RSM had prepared  
17 regarding the loss analysis for United Way.  
18 And so from my side, focused on United Way's  
19 documents, what I was focused on was the  
20 reports that were for United Way.

21 And I guess the distinction I'm making is,  
22 if they prepared a report that they use  
23 internally, well, that -- I didn't get that.  
24 That was not for the United Way. But if they  
25 put together a PowerPoint presentation for a

1 report to the special committee, that was a  
2 report for the United Way. And they also  
3 helped with the insurance claim, so that was a  
4 report for the United Way. And, in fact, those  
5 are the documents that I produced in response  
6 to Mr. Harrington's request.

7 Q. Well, I guess if I understood your testimony  
8 earlier, you were saying that once Mr. Naviloff  
9 started talking to the Government in November  
10 of 2018, anything relative to Naviloff or RSM's  
11 loss calculation -- there's no more privilege.  
12 It was gone. Because as Naviloff testified at  
13 trial, he basically took his loss calculation  
14 from RSM and carried it over to his work for  
15 the Government. So there wouldn't be any  
16 distinction as to documents -- whether they  
17 were for RSM's loss calculation or for the  
18 Government's loss calculation.

19 As I understood your testimony, the  
20 privilege didn't exist anymore as to the loss  
21 calculation for RSM; is that right?

22 A. I'm confused. I'm not sure what you want me to  
23 respond to. I'm sorry. I'm just confused.

24 Q. Well, I was asking about the fact that you said  
25 that the trial counsel didn't specifically use

1 the word "internal" emails. And I will agree  
2 with you that trial counsel did not use that  
3 specific term.

4 But trial counsel did ask for reports  
5 prepared by Mr. Naviloff, RSM, and its  
6 employees, relative to RSM's investigation of  
7 the loss resulting from Alrai's alleged  
8 fraudulent conduct. And the answer, as I  
9 understood it, was you thought they were only  
10 talking about work that involved United Way.

11 But what I'm pointing out to you is that  
12 you're saying that there's no distinction; it's  
13 the same analysis as to the loss calculation.

14 A. You mean whether it was for the United Way or  
15 for the Government?

16 Q. Correct.

17 A. Yeah, so I think we may have talked past each  
18 other a little bit. I was just trying to make  
19 a point that as it concerned me, Mr. Harrington  
20 wanted copies of reports that Naviloff prepared  
21 for the United Way.

22 And so I had to think, "Okay. What  
23 reports did Naviloff prepare for the United  
24 Way?" Well, I know there were two that went to  
25 the special committee. I know that there was

1 one that was a draft that ended up going to the  
2 insurance company. And I'm sure there may have  
3 been others.

4 But that's what I was thinking in response  
5 to that, which is "what are the reports of the  
6 loss that Naviloff prepared for the United  
7 Way?"

8 Q. Well, you spoke earlier that there might be  
9 internal documents at RSM. Like, they may have  
10 created a spreadsheet.

11 And that still is work that was done for  
12 United Way, because you had hired RSM; right?

13 A. But if you look at -- do you have  
14 Mr. Harrington's requests?

15 Q. I have it as document 47. And what I'm reading  
16 from that is what he basically does from  
17 document 47, which is his -- Defendant's motion  
18 to exclude expert testimony.

19 The first three or four pages, he  
20 summarizes -- and maybe this is a good start on  
21 what the Judge is requesting later -- Attorney  
22 Harrington basically does a history up until  
23 this point of both his requests for discovery  
24 and the Government's response to that  
25 discovery. So I was reading from that

1 document, specifically on page two, paragraph  
2 six.

3 And so that -- I guess the point I was  
4 asking you about was that discovery isn't a  
5 matter of "Simon Says." They don't have to use  
6 the exact word to invoke you having to turn it  
7 over. The spirit of that request was that  
8 Attorney Harrington was trying to get to the  
9 basis for the opinions of Naviloff.

10 That's what he was attempting to get to --  
11 were their internal reports, where their  
12 analysis -- he didn't have to use all those  
13 magic words, or the magic word "email" to get  
14 to what's the basis of Naviloff's opinion.

15 And you understood that; right? You  
16 understood that that's where Attorney  
17 Harrington was trying to get to -- was what was  
18 the basis of Naviloff's opinions; right?

19 A. Yes. So I understood his requests -- he was  
20 trying to get to the original source documents;  
21 right? RSM gathered up all of this data, and a  
22 lot of that were United Way's documents. So  
23 that he wanted United Way's documents that were  
24 accessed, reviewed, relied on by Naviloff with  
25 respect to loss analysis. I understood that.

1 Q. And as I said, I just read to you paragraph 6A  
2 which says "all reports prepared by  
3 Mr. Naviloff, RSM, and its employees  
4 collectively referred to as 'RSM' relative to  
5 RSM's investigation of the loss resulting from  
6 Alrai's alleged fraudulent conduct."

7 That does not limit it to documents in the  
8 possession of United Way, does it?

9 A. No, but for purposes of my responding to it,  
10 I'm only responsible for documents in the  
11 possession of United Way.

12 Q. But you've asserted privilege as to documents  
13 that were created and possessed by RSM?

14 A. With respect to the data security analysis.

15 Q. But my question is, you've asserted privilege  
16 as to documents created and possessed by RSM?

17 A. Yes. Yes, I have for certain documents -- for  
18 certain categories of documents.

19 Q. So in some way, you are responsible for  
20 documents from RSM, especially if they were  
21 created while they were working for United Way  
22 -- you're responsible for whether those  
23 documents get to the Defendant?

24 A. Yeah, I don't agree with that.

25 THE COURT: Well, is it more "responsible"

1           you're focused on?

2       Q.    (By Ms. Brown)  Yeah, I guess I could rephrase  
3           that.

4           You have some control over whether a  
5           document gets to the Defendant?

6       A.   I have -- through asserting of privilege, and  
7           providing a privilege log, and asking RSM not  
8           to turn the documents over, yes.  That's my  
9           role.

10      Q.   And I just have one final question.

11           Going back to the beginning of the case,  
12           late May through June of '18, at any point  
13           during that time, did any of the government  
14           agents, either being FBI agents or the U.S.  
15           Attorney's Office, ask you to preserve any  
16           data, IT environment -- anything along those  
17           lines?  Were you asked by the Government to  
18           preserve anything relative to this case?

19      A.   Were we asked to preserve anything?  I don't --  
20           bear with me, because it's been two and a half  
21           years.

22           We were asked for things.  I guess the  
23           short answer to your question is I don't  
24           remember, but I can tell you what happened,  
25           which is we were asked for things.  So in a

1 sense, that, I would say, is a server request  
2 for preservation. You know, when they say they  
3 want us to produce certain types of documents,  
4 we obviously preserve them.

5 And I know that I had discussions early on  
6 where I described the types of things that we  
7 were doing, like the fact that we were  
8 collecting laptop computers, and cellphones,  
9 and things like that. And, in fact, we sent  
10 them to a third party, StoneTurn Group. And  
11 then we had arrangements for an FBI agent to  
12 obtain those images from StoneTurn Group.

13 So I don't remember any specific requests  
14 for preservation, but I do remember periodic  
15 discussions about what the Government may be  
16 looking for and what we were doing to preserve,  
17 collect, review, and produce the evidence.

18 Q. And did you ever receive a request from the  
19 Government -- and, again, focusing on this  
20 period of time of late May through June of  
21 2018 -- did you ever receive a request to  
22 preserve, like, network scans, or preserve the  
23 IT environment as it existed at the time  
24 Mr. Alrai either worked there or shortly after  
25 he worked there?



## HEARING

97

1 A. Can you just say that -- sorry.

2 Say that one more time.

3 Q. Sure.

4 Again, focusing on the time of June of  
5 2018, when Mr. Alrai left the employ of United  
6 Way, did the Government -- and by "the  
7 Government," I mean the FBI or the U.S.  
8 Attorney's Office -- did they ever make any  
9 requests that you preserve network scans or IT  
10 environment?

11 A. No, not in those words, no. To date, the  
12 Defendant has not made a formal request that I  
13 preserve the entire IT environment or network  
14 scans.

15 Q. And you -- strike that.

16 As I understood your answer, it sounded  
17 like the way you were responding to the  
18 subpoena was on, for lack of a better word, a  
19 document-by-document request.

20 A. No, I guess I wouldn't describe it that way. I  
21 would say we did it on a rolling basis. It was  
22 an enormous undertaking, and we searched  
23 comprehensively and exhaustively. And then we  
24 produced relevant documents on a rolling basis.

25 THE COURT: What does "relevant" mean to

1       you? I mean, I don't understand how you have a  
2       role in determining that. I mean, it's  
3       discovery. What's relevant to an expert is the  
4       expert's eyeballs at every side. That's how I  
5       view it.

6               Now, I realize in a civil litigation --  
7       and in criminal too -- internal conversations  
8       might not necessarily be subject to production.  
9       And it doesn't appear that that was required  
10      here, because no one set that forth and agreed  
11      to it. But you keep invoking relevancy in a  
12      way that -- and earlier in this litigation, we  
13      had conversation about what the expert relied  
14      on. What the expert relied on is what the  
15      expert saw -- period. Because choosing not to  
16      rely on it is a decision that's very important  
17      vis-`-vis an expert's competence and bias.  
18      It's crucial information what an expert decides  
19      not to rely on, if the expert saw it.

20             And it sounds like someone was making  
21      determinations here before -- before the  
22      posttrial orders, I mean. It sounds like  
23      someone was making determinations here about  
24      what was appropriate and whether or not  
25      Mr. Naviloff relied on it based on whether he

1 actually cited it or discussed it. And from my  
2 perspective, that's just not the standard.

3 Do you understand what I'm saying?

4 THE WITNESS: Yes, but I guess there are  
5 two different issues. One issue is -- three  
6 issues. My internal investigation, the  
7 Government's investigation, and the response to  
8 the grand jury subpoena. And then there's  
9 Naviloff's investigation; right?

10 So Naviloff and RSM determine what's  
11 relevant; right? And my job in sort of  
12 overseeing their work is to make sure they have  
13 access to what they want.

14 Because if somebody says "don't let them  
15 look in that room over there" or "don't let  
16 them talk to those three witnesses," now we no  
17 longer have a fair and independent  
18 investigation; right? So when it comes to  
19 Naviloff requesting information, Naviloff asked  
20 for what we thought he needed or wanted. So  
21 that's one.

22 With respect to my investigation, and that  
23 is directly related also to producing documents  
24 to the Government, I would say it's guided by  
25 all of my experience as a civil and as a

1 criminal defense litigator. You start with an  
2 enormous amount of data. You can't review it  
3 all. You can't produce it all. And so you end  
4 up with this funnel effect as you're trying to  
5 narrow it down to a reasonable number of  
6 documents. And you use very sophisticated  
7 tools in 2018 that help you find the best  
8 documents with the least amount of effort.

9 THE COURT: That's two. You said there  
10 were three.

11 THE WITNESS: I said we had Naviloff.

12 THE COURT: Oh. Naviloff, you, and the  
13 Government.

14 THE WITNESS: And the Government.

15 THE COURT: I respectfully just  
16 observed -- and I mean this respectfully,  
17 because it's not meant to be a challenge, but I  
18 don't understand how any of that addresses what  
19 I just asked you.

20 THE WITNESS: So you want to know how do I  
21 determine relevance?

22 THE COURT: No, I don't. I don't. It's  
23 okay.

24 You can continue with your questions,  
25 Attorney Brown.

1 MS. BROWN: That was actually my last  
2 question, Your Honor. And I don't have any  
3 follow-up based on the Court's questions.

4 So I don't know if the Government has  
5 recross, but I don't have any other questions.

6 MR. HUNTER: Briefly, Your Honor. I'll  
7 try to hone in, I think, on what the Court's  
8 concern was.

9  
10 RECROSS-EXAMINATION

11 BY MR. HUNTER:

12 Q. So, Mr. Commisso, you were -- the Court raised  
13 a concern about wanting every document that  
14 Mr. Naviloff saw. So that way, the Defense  
15 could assess the relevancy determinations that  
16 Mr. Naviloff made. And defense counsel asked  
17 you some questions related to this.

18 And so with respect to the e-discovery  
19 database which you were talking about --  
20 actually, I'll -- with the e-discovery  
21 database -- from that database, you made  
22 productions to the Government in response to  
23 the grand jury subpoena; is that right?

24 A. Yes, that's correct.

25 Q. And in relation to this pretrial litigation

1 about Mr. Naviloff, Mr. Harrington was seeking  
2 documents related to Greg Naviloff's expert  
3 testimony; do you recall that?

4 A. Yes.

5 Q. And in order to identify every document in the  
6 United Way e-discovery database that  
7 Greg Naviloff could possibly have looked at,  
8 did you work with Kroll to identify those  
9 documents?

10 A. Yes, every single one of them, without making a  
11 determination if it was relevant or not. We,  
12 just turned it over.

13 Q. And I just want to talk a little bit about how  
14 the e-discovery database worked, as it's  
15 relevant to that issue.

16 Did everyone who had access to this  
17 e-discovery database have unique log-in  
18 credentials?

19 A. Yes, everyone from RSM had unique log-in  
20 credentials. And the system tracked every time  
21 an RSM employee accessed a document in the  
22 system.

23 Q. And you addressed this in your letter when  
24 defense counsel asked you some questions about  
25 it, but is the work you did with Kroll pretrial

1 related to this motion to exclude  
2 Greg Naviloff? Did you work with Kroll to  
3 identify every document in the database that  
4 anyone with an RSM log-in credential had  
5 clicked on, viewed, accessed, et cetera?

6 A. Yes, and then we produced the few documents  
7 that needed to be produced as a result of that.

8 Q. So going to the Court's question, you did an  
9 initial review in response to the grand jury  
10 subpoena where you tried to identify,  
11 basically, all the documents relevant to this,  
12 the Imran Alrai case, to put it simply?

13 A. Yes.

14 Q. And then this second search that you did was a  
15 little more technical, where you tried to  
16 identify every document in that database that  
17 somebody from RSM had clicked on, or looked at,  
18 or viewed, or accessed?

19 A. Yes.

20 THE COURT: Wait a minute.

21 This second one you're talking about,  
22 Mr. Hunter -- which one is that? Is that the  
23 one after Mr. Harrington's motion to exclude  
24 Mr. Naviloff?

25 MR. HUNTER: Yes, Your Honor. I'll

1 clarify.

2 Q. (By Mr. Hunter) So when you reactivated the  
3 database after Mr. Harrington filed his motion  
4 to exclude Greg Naviloff's testimony,  
5 Mr. Commisso, was that when you undertook the  
6 effort to identify any as yet non-produced  
7 documents?

8 THE COURT: You froze. Mr. Hunter froze;  
9 right? This is really the first hearing I've  
10 had, I think, since we've been Zooming hearings  
11 starting -- I think it was in April -- where  
12 we've had this many problems.

13 THE WITNESS: Yeah.

14 THE COURT: I'm sure Mr. Hunter can hear  
15 us talking, but he knows that we're not hearing  
16 him. Oh. He's gone.

17 THE CLERK: He actually dropped off a few  
18 times this morning, Judge, as well.

19 THE WITNESS: There were two issues that I  
20 wanted to clarify, if I can get the time to do  
21 that.

22 THE COURT: Well, I'm happy to listen to  
23 you, but the attorney conducting your cross is  
24 not in on the hearing. So I don't know if that  
25 makes a difference to the Government's counsel



1 or not, if we want to let Mr. Davis -- look, I  
2 have some questions for you too --

3 MR. DAVIS: So, Judge, I think Ms. Le and  
4 I can handle the rest of it. And I apologize  
5 for having to break.

6 Are we still on redirect now? Or are we  
7 on recross?

8 THE COURT: Yeah, we're on recross. Yes.

9 MS. LE: Hey, Judge, can we do what you  
10 were suggesting before -- we were just having a  
11 break at 12:00. Hopefully -- maybe Mr. Hunter  
12 can go into the office. Because I think the  
13 next witness is his witness to cross, if  
14 necessary. Oh, look.

15 Mr. Hunter's back on.

16 THE COURT: So we're on recross,  
17 Mr. Davis.

18 Go ahead, Mr. Hunter. Try your question  
19 again.

20 MR. HUNTER: I'm sorry about that. I lost  
21 power briefly.

22 Q. (By Mr. Hunter) So, Mr. Commisso, trying to  
23 recall where I left off.

24 So after Mr. Harrington -- this is in the  
25 context of after you reactivated the

1 e-discovery database, when Mr. Harrington had  
2 moved to exclude Greg Naviloff's testify.

3 At that point, did you work with your  
4 e-discovery vendor, Kroll, to identify every  
5 document in the database that someone with an  
6 RSM credential had clicked on, or looked at, or  
7 accessed?

8 THE COURT: Yeah, but you already asked  
9 him that, Mr. Hunter.

10 And what I asked you was "what are you  
11 talking about?"

12 Because you called it "the second time."  
13 And I think you're trying to refer to not the  
14 original grand jury production, but the time  
15 immediately after the motion to exclude  
16 Naviloff, where we resolved it rather than  
17 excluding Naviloff by producing discovery;  
18 right?

19 MR. HUNTER: Yes.

20 THE COURT: Okay. But you're talking  
21 about things like e-discovery databases and  
22 things that aren't going to have much -- we've  
23 got to talk about criminal procedure and  
24 production. How you get there is interesting,  
25 I guess, to somebody, but I need to

1 understand -- we're having documents produced  
2 in response to a motion to exclude an expert.  
3 And then there were other documents produced  
4 after the trial was over; right?

5 I think what you're trying to establish --  
6 tell me if I'm not understanding. The point  
7 you're trying to make is that that second  
8 production -- not the grand jury production,  
9 but the pretrial production -- produced every  
10 United Way document that anybody from RSM laid  
11 eyes on; is that what you're trying to  
12 establish?

13 MR. HUNTER: Yes. Every document in that  
14 collection in the database, Your Honor.

15 And broader point that I'm --

16 THE COURT: What's that mean, "in that  
17 collection in the database"? What's that mean?

18 MR. HUNTER: So I believe Mr. Commisso has  
19 testified to this. That as part of his  
20 internal investigation, he put together a large  
21 e-discovery database of documents collected  
22 from email accounts, from virtual desktop  
23 images, from United Way's records, that RSM  
24 then had access to for their analysis, and he  
25 used for his internal investigation and to

1 respond to the grand jury subpoena.

2 And the reason why I was asking these  
3 questions is because the Court inquired about  
4 how Mr. Commisso made a relevancy  
5 determination, and, in particular, raised a  
6 concern about -- regarding expert discovery.  
7 The standard being, wanting to provide every  
8 document that the expert laid eyes on. And so  
9 what I was trying to do was at least put on the  
10 record the efforts that were made to identify  
11 those documents and produce them.

12 THE COURT: Okay.

13 But don't you understand that that plays  
14 right -- that doesn't necessarily help you,  
15 because what you're saying is a lawyer for the  
16 victim decided what's relevant to produce. And  
17 that's, like, the whole point of the motion.  
18 And if that's supposed to make me feel  
19 better -- I guess it makes me understand more,  
20 but it's -- and the problem is -- it isn't that  
21 I'm questioning the relevancy determinations.

22 The point is that someone needs to be  
23 accountable and cross-examinable in a trial for  
24 that. That's how this works. It's not  
25 about -- that I question Mr. Commisso's

1 judgment, or even motives. It's just that that  
2 has to be something that everybody understands  
3 during a trial.

4 And it isn't particularly helpful to say  
5 after the fact, "Oh, none of this mattered.  
6 None of this was relevant." It's a difficult  
7 thing to know. That's up to a trier of fact --  
8 that's me in this case -- and I don't know. I  
9 just keep venting like this at you guys, and I  
10 know it doesn't help you.

11 You can continue with it, but I wasn't  
12 questioning Mr. Commisso's definition of  
13 relevancy. I was more questioning the fact  
14 that he was even making a determination to  
15 begin with of -- how that really is justified;  
16 right?

17 It's a criminal prosecution. And the  
18 victims in any criminal case produce evidence,  
19 sometimes pursuant to a grand jury subpoena.  
20 But when you have someone in the process that  
21 might have motives that could -- not improper  
22 motives, but motives that a trier of fact  
23 should be exposed to, that matters. And it's  
24 very difficult to make this determination with  
25 this. Let me ask this question.

1           And I say "it's difficult to make this  
2           determination." It's harder to keep track of  
3           all the different permutations of what was  
4           produced here at different times. I mentioned  
5           earlier to Mr. Davis -- you might have been off  
6           at the other hearing -- I mentioned of  
7           requesting a timeline. But I don't want to  
8           make you do busywork and waste your time.

9           Is there a document that I already have  
10          that kind of -- you're nodding, Ms. Le -- that  
11          kind of lays this out? Because you were just  
12          referring to it in the testimony, I know.

13          What would that be?

14          MS. BROWN: Well, I referred to document  
15          47, which is the motion to exclude Naviloff's  
16          testimony filed by Attorney Harrington.

17          So as a prelude to his request to exclude  
18          Naviloff, he documents the history of the  
19          discovery process, especially as it pertains to  
20          Mr. Naviloff. So he talks about -- they're  
21          notified when they get the report. There's  
22          back-and-forth. And I don't have that, but I  
23          think there's even the letters -- or emails  
24          that are in there, but Attorney Harrington's  
25          document 47 documents the history up until the

1 time of the filing of that motion.

2 And then if you look at the two motions  
3 that are responsive, which is document 50 and  
4 51, then I think that even picks up on, like --  
5 because I know from document 51, the Government  
6 talks about the chambers conference, and what  
7 happened in the chambers conference.

8 So if you put those three documents  
9 together -- 47, 50, and 51 -- it gives a pretty  
10 good timeline of what was happening.

11 THE COURT: Through when?

12 MS. BROWN: One's 52 -- I want to say this  
13 all is going on through October, November. It  
14 was all pretrial.

15 THE COURT: Yeah. And, see, I want the  
16 big picture.

17 Go ahead, Ms. Le.

18 MS. LE: And I know this because I wrote  
19 this part of the Government's response, Your  
20 Honor.

21 So record document 170 -- and this  
22 follows -- if you go to page five, starting at  
23 page five and on to page six, I prepared the  
24 charts about the posttrial discovery and the  
25 Court's order. We have listed for the Court

1        dates that we received certain records and  
2        dates that we provided those records to defense  
3        counsel, including the Bates number, as well as  
4        the descriptions of the contents of the  
5        posttrial discovery.

6                Which I think is what the Court is  
7        concerned about; right, Judge?

8                THE COURT: Yeah. Yes. I'm going to look  
9        at that, though, because I really don't want to  
10       create busywork for you guys just to have you  
11       file more stuff. You're very busy as it is,  
12       and you've worked hard on this.

13               I'm going to look at these documents and  
14       determine if they tell me what I want to know  
15       before I make you do anything else.

16               MS. LE: And it might help the Court when  
17       you go back and look at certain of the  
18       exhibits -- we did list all the Bates numbers  
19       by sequence. So if the Court has a particular  
20       document that is a concern that was produced  
21       posttrial, in our pleading on page six through  
22       seven --

23               THE COURT: What's your pleading -- 170?

24               MS. LE: 170, Your Honor. That is our  
25       objection to Defendant's motion to dismiss.



1 That was filed September 23, 2020. And it goes  
2 through the history of the Court's discovery  
3 order and our litigation regarding discovery.

4 And when we created these charts, we did  
5 that by documenting our production, including  
6 when we received information from either RSM or  
7 United Way, the Bates sequence, as well as a  
8 description. So that that might help the Court  
9 if you're going to go back and compare the  
10 exhibits that counsel has submitted during this  
11 litigation.

12 THE COURT: Thanks.

13 Look, Judge Johnson is trying to reach me  
14 about something that we've got to deal with,  
15 like, right now. So I'm going to have to  
16 suspend this. It's 12:11.

17 We will resume at 1:15; okay?

18 (Recess taken at 12:11 p.m., and the  
19 proceedings resumed at 1:17 p.m.)

20 THE COURT: All right.

21 Let's resume, please.

22 MR. HUNTER: No further questions from the  
23 Government.

24 THE COURT: Okay.

25 Attorney Brown?

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REDIRECT EXAMINATION

BY MS. BROWN:

Q. I just want to clarify something,  
Attorney Commisso.

You were asked questions about this  
e-discovery database. I think we already  
established earlier that this e-discovery  
database, we now know, didn't have everything  
that RSM had access to?

A. That's correct.

MS. BROWN: That's my question.

THE WITNESS: Okay.

THE COURT: And, Mr. Commisso, you said  
you wanted to clarify a couple of things. And  
even though it's unusual, I know you were  
admitted pro hac vice, so I want to give you an  
opportunity to do that.

THE WITNESS: Okay. And, really, I think  
it's just one thing.

I gave an answer last Thursday.

The answer I gave was "we were all working  
together." And as soon as I said those words,  
I knew that it needed clarification. I believe  
the context was pretrial discovery.

1           So after Mr. Naviloff was hired by the  
2           Government, and after Mr. Harrington had  
3           submitted requests for certain discovery  
4           concerning Mr. Naviloff, there was a series of  
5           email messages. I don't remember the exact  
6           exhibits. I don't remember the exact question.  
7           But I do know what I meant by my testimony when  
8           I said we were all working together.

9           As I've explained, I was responsible for  
10          producing United Way's documents and for  
11          protecting United Way's privilege. And so I  
12          had conversations with Greg Naviloff and others  
13          at RSM. I had conversations with Mr. Davis and  
14          others in the U.S. Attorney Office. And, I  
15          guess, in a sense together, we were working to  
16          identify and produce documents, to the extent  
17          that we could, in response to Mr. Harrington's  
18          pretrial discovery request.

19          So I didn't want to just leave that  
20          answer, "we were all working together," hanging  
21          out there as something having bigger meaning  
22          than I had intended.

23          THE COURT: Okay. That's understood. I  
24          hadn't seized on it in any kind of way like  
25          that, but I understand your point. Let me ask

1           you this question.

2           You brought this case -- I think it was  
3           you, personally, right, to the U.S. Attorney's  
4           Office in Boston before the New Hampshire  
5           office accepted it -- at least that's what some  
6           of the briefing says.

7           Were you involved in that?

8           THE WITNESS: I contacted the U.S.  
9           Attorney's Office in Boston twice. And before  
10          we really got into a discussion, a prosecutor  
11          in Boston notified me that the case was already  
12          active in New Hampshire, and I was introduced  
13          to Mr. Davis.

14          THE COURT: Oh. All right.

15          So what I've read -- that they twice  
16          declined prosecution -- is that inaccurate?

17          THE WITNESS: I can only tell you my  
18          understanding. My first call to the U.S.  
19          Attorney's Office in Boston, I asked some  
20          questions and I did not identify my client. So  
21          there was no -- in the first call, there was no  
22          declination. There was just a discussion about  
23          some issues in general without identifying a  
24          client.

25          In the second call, I called and said,

1 "Okay. We want to move forward. I'm going to  
2 identify my client, and I would like to  
3 schedule a meeting." And very shortly after  
4 that, I was told that I would be introduced to  
5 Mr. Davis because they already had an active  
6 investigation.

7 THE COURT: Okay.

8 MR. DAVIS: Judge, may I make a brief  
9 proffer on that?

10 THE COURT: Absolutely. I was just going  
11 to ask you to do that. Yes.

12 MR. DAVIS: So, Judge, the New Hampshire  
13 federal investigators' open investigation at  
14 the end of 2017 -- that was based on bank  
15 information regarding the wires to Pakistan.  
16 And so well before we knew anything about  
17 anything at United Way, both the FBI and  
18 Homeland Security had an open investigation  
19 that I, at least, had a meeting and maybe two  
20 meetings at. Some subpoenas were issued. So  
21 we were -- and we were aware of Mr. Alrai's  
22 travel in the spring of 2018. And, if you  
23 recall, there was evidence about the border  
24 search as he came back in in April of 2018.

25 So all of that had happened in this case

1 with New Hampshire before Mr. Commisso called  
2 Mass. And the FBI notified me that United Way  
3 had called Massachusetts. I communicated with  
4 the fraud chief in Boston. And we quickly  
5 resolved that, because we had the open case, we  
6 would continue.

7 THE COURT: Okay. That's actually fairly  
8 significant -- to me, anyway. And I think  
9 that's the first time I've heard that.

10 The reason I say that is only because if  
11 one has to sit -- I mean, look, I think the  
12 motives of counsel representing a client who's  
13 been victimized -- or allegedly victimized,  
14 right, by an employee are not hard to  
15 understand.

16 But it's a very different picture of  
17 Mr. Commisso seeking twice to have a case  
18 investigated and prosecuted by the Boston  
19 federal authorities, being rebuffed, and then  
20 coming to New Hampshire and affirmatively  
21 seeking that out. That's a very different  
22 picture than you've presented, because it would  
23 -- it might suggest more about the intensity of  
24 counsel's or the client's wishes to have the  
25 case prosecuted for any number of reasons.

1           So the fact that there's an open case  
2           already and you knew it was underway is -- I  
3           think that's significant information, and I'm  
4           glad to have it now.

5           THE WITNESS: And, Your Honor, I was never  
6           rebuffed in my discussions with the prosecutor  
7           in Massachusetts.

8           THE COURT: Yeah, I gather that now. I  
9           gather that now. It's just one of those things  
10          that gets worked out between districts. Okay.  
11          Second question about that.

12          When you first dealt with federal  
13          prosecutors, Mr. Commisso, be it Boston or  
14          New Hampshire, I know you eventually produced  
15          documents pursuant to a grand jury subpoena, or  
16          a number of them; right?

17          But in your initial content -- I can think  
18          of when I was a prosecutor, if I had received a  
19          contact from a victim -- an alleged victim or  
20          their counsel, I probably would have requested  
21          some documents just to kind of get started --  
22          to review the situation.

23          Did that happen here?

24          THE WITNESS: So your question was broken  
25          up and I might have missed the important part

1 of it.

2 So you said "did that happen here." Did  
3 what happen here?

4 THE COURT: Before you began responding to  
5 grand jury subpoenas, were you responding to  
6 other sort of just more informal or less formal  
7 requests for information? Did any of the  
8 prosecutors or federal agents ask you to give  
9 them any documents so they could review your  
10 situation and decide whether to open a case?

11 THE WITNESS: So what I remember was a  
12 first meeting with Mr. Davis at the very  
13 beginning of June.

14 THE COURT: As to what?

15 THE WITNESS: The very beginning of June,  
16 approximately June 3 or 4. And Mr. Vossio  
17 attended with me.

18 And at that meeting, we had a small binder  
19 of documents, approximately 15 to 20 documents,  
20 that we had put together that helped to tell  
21 the basic story as we understood it. And I  
22 believe we left one or more copies of that  
23 binder with Mr. Davis or with the agents.

24 And within 24 hours of that meeting, we  
25 had a grand jury subpoena. And I believe we



1 started producing and enrolling production --  
2 batches of documents as quickly as we could.

3 THE COURT: Okay. Yep.

4 My other question, and I want to ask this  
5 question again with Mr. Commisso still on the  
6 witness stand, only because I think the next  
7 witness won't have any information about it.

8 I want to explain how I remember  
9 something, and to determine if I have it right  
10 or wrong, through Counsel. My memory is that  
11 Mr. Harrington moved to exclude Mr. Naviloff.  
12 And then we got -- this is before COVID, but we  
13 got on the -- I think it was a telephone call  
14 together, because it was kind of a discovery  
15 dispute in a way. At least that's the way I  
16 saw it. I was never really seriously  
17 considering excluding Mr. Naviloff, but I  
18 thought, I think maybe correctly, that this is  
19 just an attempt to get information.

20 And what I said was -- and tell me if I  
21 got this wrong -- I said, "Look" -- I asked him  
22 on the phone, "Mr. Harrington, what do you  
23 want?" He kind of listed it out.

24 And I sort of charged you guys to -- the  
25 prosecutors and defense lawyers to "go work it

1 out and get back to me if you can. If there's  
2 anything you disagree about, let the Court know  
3 and I'll resolve it." But my memory is you did  
4 resolve it. And that's -- I think the letter  
5 we've seen in this hearing was part and parcel  
6 to that process. It was sort of a request from  
7 Mr. Harrington about -- a bullet list of things  
8 he wanted, and you were working through it  
9 together.

10 I don't remember you coming back to the  
11 Court saying, "We have these areas of  
12 disagreement. Could you resolve them?"

13 Do I have that right, roughly, if anybody  
14 remembers -- Mr. Hunter, Ms. Le, Mr. Davis --  
15 about what happened?

16 MR. HUNTER: I think so, Your Honor. I  
17 think there was one point of disagreement.

18 And that was Mr. Harrington sent us a list  
19 of search terms for John Commisso to run  
20 through the e-discovery database. And that's  
21 what prompted Mr. Commisso's letter.

22 We forwarded it to him. And it was -- the  
23 cost to reactivate the database, and run the  
24 searches, and do the review that would be  
25 required -- so that was the thing we weren't

1       able to resolve. But we were able to resolve  
2       other issues, which goes to -- like, I've got  
3       to find the documents anyone from RSM clicked  
4       on, for example, was part of that resolution.

5           THE COURT: Yeah. I think -- did I sort  
6       of give you a new list of search terms that was  
7       somewhat narrowed? Did I do that? Or how did  
8       we get that resolved? Anybody remember?

9           MS. LE: Go ahead, Mr. Commisso.

10          THE WITNESS: So what I recall is we had a  
11       hearing about the list of search terms and  
12       about my letter. And there was a discussion --  
13       there certainly was no agreements.

14          I'm not sure about the resolution, but in  
15       terms of how it was reported on the docket, I  
16       believe if you look at one of the final orders  
17       on the docket before trial, it makes a  
18       reference to "the matter is resolved as stated  
19       at the hearing," or something like that, so  
20       that you have to read the transcript to know  
21       how it was resolved. That's what I remember.

22          THE COURT: Okay.

23          But, certainly, nobody stood up and said,  
24       "No, I'm entitled to something I haven't  
25       received." Or no one said, "Judge, we still

1 haven't produced this, and we'd like you to  
2 resolve it." Once I issued that order, I don't  
3 think we heard anybody else object or counter  
4 that. Okay.

5 Ms. Brown, if you have any different  
6 information, by the way, please share it. You  
7 weren't there at the time, I know, but you  
8 might have a different understanding.

9 MS. BROWN: Not about what was said at the  
10 hearing. I think -- in terms of understanding,  
11 I think one of our issues is -- I kind of  
12 referred to it at my cross-examination --

13 That discovery isn't about "Simon Says."  
14 That you don't use -- it was very clear that  
15 Attorney Harrington and his partner were trying  
16 to get at the basis of Mr. Naviloff's opinion.

17 Where was it coming from? What was it  
18 based on? Who did he consult with? All of  
19 those things. And he may not have used the  
20 precise words to trigger a search of -- but I  
21 don't think that's necessary for Brady.

22 I think, first of all, the Government has  
23 the obligation of Brady, regardless of whether  
24 the Defendant asks for it. Because if you  
25 don't know it's there, you don't know what to

1 ask for.

2 But, secondly, there's no question that  
3 counsel for Mr. Alrai was trying to get at the  
4 bottom of this opinion, both on the advice of  
5 his expert in IT, and because he wanted to be  
6 able to cross-examine this witness about the  
7 basis of his opinions. And that's articulated  
8 in document 47. So I don't think it's a matter  
9 -- it's not necessary for a Brady violation  
10 that he used a magic term to get a magic  
11 document. And so I just wanted to add that.

12 But I will also agree that how the  
13 litigation regarding Naviloff tied up was  
14 somewhat loose in terms of whether that --  
15 like, whether that motion was still live or  
16 not. It sounds like there was some resolution.  
17 It's not like a situation where Attorney  
18 Harrington filed a motion to withdraw the  
19 motion to exclude Naviloff.

20 Or did he say, "Oh, well, yeah, I'll take  
21 some discovery" -- was he withdrawing his  
22 objection by accepting additional discovery?  
23 That's not clear to me.

24 THE COURT: Well, it's clear to me. It's  
25 clear to me only because I'm trying to keep

1           your motion in context.

2           There wasn't a request, once the Court  
3           said it was resolved or during the trial, where  
4           anybody said, "Look, there's something I was  
5           entitled to I didn't get." But your point  
6           about Brady is well received. I understand  
7           your point.

8           It's just that -- I can't say that I'm  
9           persuaded by it, but I understand that there's  
10          a difference between you didn't comply with the  
11          discovery rule or order and, well, during your  
12          compliance, you either became aware or should  
13          have become aware of Brady material, to which I  
14          am entitled, regardless of any order or rule.  
15          That's a different thing.

16          And that's your argument; right?

17          MS. BROWN: That is my argument. That's  
18          what I'm going to address when I sum up the  
19          presentation.

20          THE COURT: Okay. I just wanted to have a  
21          conversation while we still have Mr. Commisso  
22          here under oath. I think I've got the answers  
23          as best as I'm going to get. And I think we  
24          should move on to the next witness.

25          MS. BROWN: Well, Your Honor, over the

1 weekend and again this morning, cocounsel and I  
2 have conferred. And I don't think we're going  
3 to call Mr. Meyer. Most of what we get from  
4 him is rehashing his testimony, which is --  
5 there's a transcript of it, and it is what it  
6 is. I don't think we need him to go through  
7 his testimony again, because it's the record.  
8 So we've elected not to call him.

9 I'll ask Attorney Commisso if he can  
10 notify Mr. Meyer. I know he's been waiting,  
11 and I apologize for that. But we couldn't make  
12 that call until we had examined Mr. Commisso.  
13 So that would be our final -- well,  
14 Attorney Commisso would be our final witness.  
15 We do have some summation for the Court.

16 I don't know if the Government has any  
17 witnesses. I don't think they do, but --

18 THE COURT: Give me a second then. I'm  
19 just going to check my notes in case there's  
20 anything I wanted to ask Mr. Commisso that I  
21 would have asked Meyer. Hold on a minute.  
22 Okay.

23 I have some questions, but I think only  
24 one of them needs to be done now with  
25 Mr. Commisso.

1 I'm looking at document 1-64-12,  
2 Exhibit 12 to Attorney Brown's motion. It's an  
3 email -- we've talked about it. It's an email  
4 where Mr. Naviloff emailed Mr. Commisso some  
5 folders.

6 And he said, "Let's discuss the contents  
7 of these four folders for potentially providing  
8 to the USAO"; right? And I guess my question  
9 is -- like, I'm not sure who to ask this of.

10 Which of the three of you prosecutors was  
11 primarily dealing with Mr. Naviloff? Was there  
12 one of you who was doing it, or was it all of  
13 you?

14 MR. DAVIS: Judge, I would say  
15 Mr. Naviloff was Matt Hunter's witness, but  
16 that I was the lead. And I think we talked  
17 about -- Matt and I probably talked about every  
18 issue of significance with Mr. Naviloff.

19 THE COURT: Then here's my question for  
20 both of you. I'll ask you first, Mr. Davis.

21 Were you aware that Naviloff, who is by  
22 this time your expert -- okay. You retained  
23 him -- were you aware he was consulting with  
24 Mr. Commisso about his productions to you?

25 MR. DAVIS: So, Judge, I would have said



1        what I was aware of was that anything that  
2        potentially involved privilege -- that is,  
3        United Way's privileges that were still being  
4        asserted -- would be run through Commisso. And  
5        in numerous discussions with Naviloff, that  
6        step in the process was always acknowledged and  
7        something we expected. And Matt may be able to  
8        supplement that further, but I certainly --  
9        well, I guess I'll leave it at that.

10        THE COURT: Well, would you agree with me,  
11        though, that this email, unless I misunderstood  
12        the testimony from the witnesses in this  
13        hearing -- this conversation seems to go beyond  
14        that. This isn't clearly a discussion of  
15        what's privileged, unless I'm misunderstanding.  
16        This seems to go beyond a discussion of  
17        privilege. And it has Mr. Commisso involved in  
18        Naviloff's document productions in a way that  
19        exceeds or that goes beyond the scope that you  
20        just described about privilege discussions;  
21        right?

22        MR. DAVIS: I certainly agree it's beyond  
23        the scope of privilege. I think Mr. Commisso  
24        can further illuminate that, and Matt, maybe,  
25        as well. Because I think it's fair to say that

1 Naviloff, at various times, would have  
2 encountered a scope issue. Because he's at  
3 RSM. And RSM, writ large, is doing several  
4 different things for United Way.

5 And my understanding -- my broad  
6 understanding of this issue is that it was a  
7 scope question for Naviloff. That is, are all  
8 of the folders on this thing what we're talking  
9 about here or not? I don't read it as a  
10 relevancy sort of conference between Naviloff  
11 and Commisso.

12 THE COURT: Yeah. I almost wish I had  
13 sequestered all of you before we had this  
14 conversation, but I'm just going to continue  
15 with you. I don't mean that in an insulting  
16 way. I hope you don't take it that way. It's  
17 just we all, as human beings, have a tendency  
18 to influence each other.

19 But, Mr. Davis -- so what you just said  
20 there -- my understanding is that goes to this  
21 scope issue involving RSM's work that goes  
22 beyond loss calculation; okay?

23 And I guess my question -- and you said,  
24 "I read this as a discussion of that kind of  
25 scope issue, because we both agree it's not

1 privileged."

2 What's the basis for that understanding?  
3 What makes you read it that way? What is the  
4 basis for your understanding that this isn't  
5 Mr. Naviloff consulting with Mr. Commisso  
6 regarding his production to your office  
7 regarding loss calculation?

8 MR. DAVIS: I think it's what I've been  
9 told about it. And I just -- I don't trust my  
10 memory. I'm not looking at the document,  
11 either. I would defer to Matt Hunter and  
12 Commisso on the point.

13 And I'm sorry I'm not being helpful. As  
14 you might have guessed, Judge, I'm 62.  
15 Questions about folders, I'm not as sharp on.  
16 I don't mean to make excuses, but I would trust  
17 Matt's memory and I would trust John Commisso's  
18 memory much better than I.

19 THE COURT: And I accept your answers, by  
20 the way, as being as honest and straightforward  
21 as your memory will allow.

22 Mr. Hunter, do you follow that line of  
23 questioning? It appears to Mr. Davis, and I  
24 agree, that this conversation here in this  
25 Exhibit 12, document 1-64-12, is not about

1 privilege. Now, Mr. Davis has told me what he  
2 thinks it refers to, and then he's explained to  
3 me why he thinks that -- what the basis is.

4 What's your understanding of what this  
5 conversation's about, if you have one? Well,  
6 let me ask you first a question that I asked  
7 Mr. Davis first.

8 Were you aware that Mr. Naviloff was  
9 consulting with Attorney Commisso, part and  
10 parcel to this production of his expert file to  
11 you?

12 MR. HUNTER: So the part that I was aware  
13 of, Your Honor, was that, similar to what  
14 Mr. Davis said -- that United Way waived its  
15 privilege as to RSM's loss analysis, but not  
16 everything that RSM did. So I was aware that  
17 RSM, because they couldn't waive the privilege  
18 or produce privileged materials, was consulting  
19 with John Commisso to ensure that they were  
20 producing things that were within the scope of  
21 that waiver, and were not producing things that  
22 had to do with other work that RSM was doing.  
23 So that was my understanding of that.

24 And regarding -- and I don't know exactly  
25 the title of this particular email, but I do

1 know that when we got it -- a discovery request  
2 from --

3 THE COURT: It's August 2019.

4 MR. HUNTER: Okay. So, yeah, this is when  
5 we're getting discovery requests from  
6 Mr. Harrington. And I know what we asked RSM  
7 for is we wanted basically the work file --  
8 like, all of their analyses, any documents that  
9 they had that they relied on or considered in  
10 their analysis. And we were looping in  
11 John Commisso to ensure that RSM didn't produce  
12 something that was outside the privilege  
13 waiver.

14 So my understanding was that was what the  
15 consultation was about. Not -- again, not to  
16 discuss what is relevant to your loss  
17 calculation; but is this something that relates  
18 to other work streams that RSM was doing for  
19 the United Way?

20 THE COURT: Okay.

21 And what's the basis of that  
22 understanding? Where did you learn that?

23 MR. HUNTER: The basis for that  
24 understanding -- it is where we were at this  
25 stage in the litigation, the summer before

1 trial. Because I think at that point there was  
2 a general understanding that United Way had  
3 waived all privileges to the work Naviloff did  
4 for loss. But we knew that there was other  
5 work that RSM had done.

6 THE COURT: So you're surmising that based  
7 on the timing of the conversation?

8 MR. HUNTER: And my understanding at that  
9 time of the nature of United Way's privilege  
10 assertion. That we had asked RSM to -- we had  
11 asked to ensure that -- we knew that RSM was  
12 consulting with John Commisso regarding  
13 privilege, and we asked them to do that.  
14 Because we didn't have a right to seek  
15 privileged material.

16 But what we asked for is we wanted  
17 everything that had to do with the work  
18 Greg Naviloff did as to loss. So that was my  
19 understanding of what -- the discussions we had  
20 had and what we were seeking to get.

21 THE COURT: But, again, you're surmising  
22 it. You're basing your understanding of what  
23 this email means based on its timing and your  
24 understandings of, as you point out, the scope  
25 of the waiver and other work streams.

1           In other words, it's not like you know  
2           today, one way or the other, whether Naviloff  
3           was just plain consulting with Commisso about  
4           what to produce.

5           MR. HUNTER: I certainly -- we've had a  
6           whole hearing about this. I think that  
7           Greg Naviloff and John Commisso haven't said  
8           that there was that sort of activity going on.  
9           And we certainly did not ask for that type of  
10          activity to be going on. And so I have no  
11          reason to think that that activity was going  
12          on.

13          I understand there's this email. But I  
14          see this email is consistent with what we did  
15          understand, which was John Commisso was  
16          protecting United Way's privilege. I  
17          suppose -- I have no reason to think or dispute  
18          that that is what was happening, if  
19          John Commisso testified about it and  
20          Greg Naviloff testified about it.

21          THE COURT: I know, but -- okay. That's  
22          true. But Ms. Brown filed a motion about it.  
23          And there's been a lot of time since you filed  
24          the motion and we had the hearing.

25          So I guess I'm asking you, did you talk to

1 witnesses and say "what's this all about?"  
2 Because you haven't told me that's the basis  
3 for your understanding. You're sort of  
4 surmising it. And, like, that's fine, but  
5 there's also just preparing a witness.

6 "Hey, were you consulting with Commisso  
7 about everything you did before you did it?  
8 And in what way, and about what?" I mean, did  
9 you have those conversations? It sounds like  
10 you did not.

11 MR. HUNTER: So those conversations are --  
12 we asked Greg Naviloff and John Commisso to  
13 prepare declarations of what they did and what  
14 happened. And those are the declarations that  
15 we attached to our motion.

16 THE COURT: And I don't mean to be flip  
17 here, but I'm taking that as a "no," that you  
18 didn't ask him these questions that I'm asking  
19 you right now.

20 Like, "What was this conversation about?  
21 What was your work -- what was the nature of  
22 your working together?" These are -- I don't  
23 look at any of this as inappropriate, but I  
24 want to understand it. And we're all kind of  
25 circling around it a little bit. I guess



1           that's the best we're going to do.

2           MR. HUNTER: Your Honor, the reason why --  
3 we tried to go through every single email that  
4 defense counsel attached to their motion. We  
5 did have, I think, the general conversation  
6 that is reflected in the declaration -- that he  
7 did a review for privilege. And that was our  
8 understanding.

9           THE COURT: So you're telling me, then,  
10 that defense counsel files a motion with an  
11 email where your expert is talking to the  
12 lawyer for the victim and saying, "Let's  
13 discuss these documents before we produce them  
14 to the U.S. Attorney."

15           And you didn't put that in front of the  
16 witness and say, "What is this about? What's  
17 going on here?" That didn't happen?

18           MR. DAVIS: Judge, I would just add --

19           THE COURT: Wait a minute. Whoa. Whoa.

20           MR. DAVIS: I'm sorry.

21           I'm just saying, any prep of the witness  
22 is mine, Judge, not Matt Hunter's.

23           THE COURT: Oh, well, I guess I'll ask  
24 you.

25           I mean, is that something you -- I realize

1 the answer could be yes or no, but I'm asking  
2 what it is.

3 Did someone ask Naviloff, did someone ask  
4 Commisso, "What's this about?"

5 Because I just asked you a minute ago,  
6 "What's the basis for your understanding?"

7 And you didn't say, "I asked him before  
8 the hearing and they told me." You said -- I  
9 don't know.

10 MR. DAVIS: I don't believe I put either  
11 of the emails in front of either witness. And  
12 I don't think we specifically discussed that  
13 question.

14 THE COURT: Okay.

15 THE WITNESS: So, Judge, I'd be happy to  
16 respond to any of these questions.

17 THE COURT: No, I'm good, Mr. Commisso. I  
18 do have some questions about the process, but  
19 that was really the only one.

20 Well, I guess, let me just ask you this,  
21 Mr. Commisso: Have you heard anything from the  
22 prosecutors that's inconsistent with your  
23 understanding of what's transpired here in  
24 terms of your dealings with Naviloff or your  
25 dealings with them?

1           THE WITNESS: Well, I think there's a lot  
2           that I could say that would clarify these  
3           issues. And I can tell you what I was doing  
4           with Naviloff, and why, during that period of  
5           time.

6           THE COURT: And I'm sure you could. The  
7           question isn't so much your answers to it. The  
8           question is whether anybody -- is whether the  
9           trier of fact in this trial had an opportunity  
10          to hear all this. All right? Because there's  
11          lots of inferences that can be drawn. That  
12          seems to be lost on everybody here.

13          The fact that you guys have an account of  
14          what happened, whether or not I think it's  
15          accurate based on any number of factors, like  
16          your memories, your motives now, your motives  
17          at the time -- those are all interesting  
18          issues. But those are  
19          a-trier-of-fact-for-a-trial issues.

20          I know I'm supposed to do a privilege --  
21          not privilege -- a prejudice assessment here.  
22          It's part of the burden. But I'm not -- I  
23          think I have the information I need to make  
24          that assessment. Because if there's something  
25          I don't understand, there will be explanations.

1 I know there will be.

2 And you're a defense lawyer. You  
3 understand. Criminal trials are about  
4 cross-examination. They're about testing the  
5 witnesses. Let me just ask you this,  
6 Mr. Commisso.

7 You've, I'm sure, represented clients  
8 either facing trial or in trial where the  
9 prosecution had expert witnesses; right?

10 THE WITNESS: Yes.

11 THE COURT: I mean, have you?

12 THE WITNESS: Yes.

13 THE COURT: And I assume that you make  
14 your normal discovery requests, and you're  
15 provided with the file or whatever you've  
16 requested in some form; right?

17 THE WITNESS: Correct.

18 THE COURT: Have you ever had one when an  
19 expert was working with a staff from his or her  
20 business, whether it was an accounting firm or  
21 something, where underlings or coworkers were  
22 also working on the file?

23 THE WITNESS: No, I can't think of  
24 something in particular that matches that  
25 circumstance.

1           THE COURT: A straight answer. I  
2 appreciate it.

3           But if you did -- because there's a 6th  
4 Amendment right to confrontation law on this;  
5 right? If you did, wouldn't you expect to see,  
6 if you had an expert -- if you're dealing with  
7 an expert testifying against your client facing  
8 felony charges, I assume you wouldn't want to  
9 just see what -- you wouldn't take the expert's  
10 word, first of all, about what he relied on.

11           You'd want to see everything he reviewed;  
12 am I right?

13           THE WITNESS: Well, that gets to the heart  
14 of the issues in this case.

15           THE COURT: Well, that's exactly why I'm  
16 asking you.

17           Are you telling me that an expert witness  
18 testifying against your client in a federal  
19 criminal trial -- you would take the expert's  
20 word for what he relied on, and not everything  
21 he reviewed?

22           THE WITNESS: I would make a request for  
23 all the documents that he reviewed and relied  
24 on.

25           THE COURT: Right.

1           And if he was working with underlings -- a  
2           staff or coworkers, you'd want to see the  
3           communications between them, wouldn't you?

4           THE WITNESS: Well, I don't know that I  
5           would have the right to. The rules of  
6           discovery don't go that far.

7           THE COURT: Not my question.

8           Would you request it?

9           THE WITNESS: If I was doing my job well,  
10          yes, I would expect to request it.

11          THE COURT: And wouldn't you expect, once  
12          you requested it, the prosecutors at least to  
13          review it to determine whether or not you were  
14          entitled to it -- at least review it to  
15          determine if there was exculpatory evidence?

16          THE WITNESS: Well, no, not if it's  
17          outside the bounds of discovery.

18          THE COURT: So you'd make a request that's  
19          outside the bounds of discovery, and not assume  
20          that when they responded to it, maybe imposing  
21          some restrictions on whatever you'd  
22          requested -- you would assume they hadn't even  
23          reviewed it?

24          THE WITNESS: Well, now I'm thinking about  
25          the context of this case. And I'm thinking

1 about the fact that the Government didn't have  
2 possession of this evidence, and the evidence  
3 that we're talking about now was way outside  
4 the bounds of permitted discovery. So I would  
5 not have expected the prosecutors to have  
6 requested this discovery that nobody thought  
7 the Defendant was ever entitled to.

8 THE COURT: So when you were going through  
9 the items, because I -- by the way, I do accept  
10 that Mr. Harrington didn't make a request for  
11 internal communications. I do, unless there  
12 was no violation of any sort of rule or order  
13 there. I'm with you.

14 But were there discussions between you and  
15 the prosecutors about the internal  
16 communications at RSM regarding this document  
17 review? It would seem strange to me that one  
18 would rely on all these people that are  
19 reflected in the bill that wasn't produced, and  
20 not -- just at least discussed the  
21 communications.

22 THE WITNESS: Well, I would say no. And  
23 the reason why I feel confident saying no is  
24 I'm looking now at Mr. Harrington's discovery  
25 request from July 30, which I think was the

1 first one.

2 THE COURT: Yeah.

3 THE WITNESS: And he asked for a copy of  
4 all documents and other data "collected and  
5 reviewed by RSM in calculating the loss."

6 And those words, "collected and reviewed,"  
7 meant something to me, because that's exactly  
8 what I think of when I think of expert  
9 discovery. And those are the United Way  
10 documents. Those are the invoices, the  
11 contracts, the accounting record; right?

12 THE COURT: Yeah.

13 THE WITNESS: So that's what we're talking  
14 about -- is where do we find the documents that  
15 were collected and reviewed?

16 And then in another request it was  
17 "reviewed and relied on."

18 But at no time do I remember saying "where  
19 do we find" or "who's going to find" or "should  
20 we find the internal work papers and the  
21 internal email communications?"

22 THE COURT: I understand -- believe me, I  
23 understand that it wasn't requested --  
24 demanded.

25 But to me, "relied on" -- I mean, if



1       you're going to rely on -- if you, as an  
2       expert, are going to rely on underlings to  
3       develop IT -- because he's not an IT expert.  
4       He's an accountant; right? We talked about  
5       that ad nauseam. It was trial testimony. If  
6       I'm going to rely on -- I forget his name...

7               THE WITNESS: Ryan Gilpin.

8               THE COURT: Ryan Gilpin. Right. And  
9       there was another one that he did testify at  
10      trial. If you're going to rely on his work,  
11      well, when he transmits that work to you, it  
12      might very well include an explanation of his  
13      analysis. And that would seem to me something  
14      that the expert relied on.

15              I realize it wasn't as specified as  
16      "producible, discoverable." But, to me, the  
17      Brady obligation at least makes me wonder  
18      whether that should be reviewed. And that's  
19      kind of what I'm stuck on here.

20              THE WITNESS: And I guess I'm at least two  
21      or three steps removed from that because I  
22      wouldn't have been part of any decision-making  
23      process about RSM's documents. And my mind  
24      never went anywhere in that direction with  
25      respect to those kinds of internal

1           communications. It's not something I've ever  
2           talked about in any litigation that that would  
3           be subject to discovery.

4           THE COURT: I accept everything you say,  
5           except the first thing you said is that you  
6           were not involved in the production of RSM --  
7           you were involved in the production of RSM  
8           documents. RSM's witness was asking you  
9           questions about what to produce.

10          THE WITNESS: With respect to United Way  
11          documents.

12          THE COURT: Oh, I see, not RSM. Yeah, I  
13          mean, I think of the RSM documents as what RSM  
14          reviewed. And I view it as their  
15          communications with each other, although I do  
16          realize that those were not requested or  
17          ordered to be produced. This puts this in a  
18          very sort of odd posture. Okay.

19          Listen, I asked Mr. Commisso some  
20          questions. If either side wants to pursue my  
21          line of questioning with cross or direct, or  
22          whatever you want to call it -- if you want to  
23          cross my exam, I'll allow Ms. Brown first and  
24          then Mr. Davis.

25          Any questions, Ms. Brown?

1 MS. BROWN: I just wanted to clarify to  
2 Mr. Commisso.

3 Q. (By Ms. Brown) As a criminal defense lawyer,  
4 you're also familiar with constitutional law;  
5 right?

6 A. Yes.

7 Q. And so you're familiar that there's case law  
8 that says a defendant may object if the expert  
9 who is giving the opinion on the witness stand  
10 is not the person -- is, for lack of a better  
11 word -- I use this -- ghost expert.

12 So if there is a testifying witness and  
13 that witness is testifying to things that  
14 would, arguably, be hearsay or at least not  
15 allow the Defendant to cross-examine the  
16 opinions that come from some other expert, a  
17 criminal defense attorney may want to object to  
18 that, because they can't cross-examine the  
19 underlying opinions if that person isn't  
20 called; do you understand that case --

21 A. I'm familiar with the idea because you briefed  
22 it in this case.

23 Q. And so in order to make that objection that  
24 someone's opinion is coming from -- some  
25 expert's opinion is coming from someone else,

1           you'd have to know about it; right?

2       A.    I'm not sure what to say. I haven't litigated  
3           this issue outside of this case, so I don't  
4           have any experience litigating this specific  
5           issue about expert discovery in a criminal case  
6           like this.

7       Q.    But you did have the billings that RSM sent to  
8           you. And, in fact, your name is right on the  
9           bill that they sent to you for their work both  
10          for RSM -- I don't think they would have sent  
11          you the bills for the Government -- but they  
12          sent you the work that they, meaning RSM, did  
13          for United Way; right?

14      A.    Yes, I received bills from RSM.

15      Q.    And you understood that at least six or seven,  
16           if not more, people worked on the loss  
17           analysis; correct?

18      A.    I understood what the bills showed. And, yes,  
19           I met more than six or seven people over the  
20           course of the engagement.

21      Q.    And that was information that you were privy to  
22           that, as far as you know, the Defense attorney  
23           didn't know about.

24                    You didn't share your billings with  
25           defense counsel prior to trial, did you?

1 A. I don't know whether he was privy to it or not.  
2 And I know he never asked me for that  
3 information.

4 MS. BROWN: I have nothing further.

5 THE COURT: Mr. Commisso, though -- didn't  
6 Naviloff say -- didn't he testify that he  
7 discussed the issue of internal RSM emails with  
8 you?

9 THE WITNESS: I know he testified -- you  
10 mean at the first date of this hearing?

11 THE COURT: Yeah.

12 THE WITNESS: He testified about the  
13 issue. I don't remember specifically what he  
14 said.

15 THE COURT: What I remember is he said he  
16 asked you about it and talked to you about it.  
17 I think I was the one asking him questions.

18 MS. BROWN: For the Court's convenience,  
19 there's a transcript of it. And it's at, I  
20 think, page 127 -- of what you talked about.  
21 Because you asked -- you did ask about it. And  
22 we can address that, but it is in the  
23 transcript.

24 THE COURT: I'll take a look at it. I'm  
25 sure you're going to point me to it when you

1           argue.

2           Ms. Brown, let me ask you a question  
3 before I let Mr. Davis ask the witness.

4           Mr. Commisso just said, well, he's  
5 familiar with that body of law because you  
6 briefed it -- the idea of communications with  
7 people relied on doing a forensic analysis.

8           I think of that issue as sort of part of a  
9 Crawford, Davis, Bullcoming type of analysis;  
10 right? Is that what you're talking about?

11          MS. BROWN: Exactly.

12          THE COURT: Okay. And that's not about  
13 discovery. That's not about Brady, but it's  
14 about confrontation, which, to me, ties in a  
15 little bit.

16          MS. BROWN: It was just a follow-up to  
17 your questions about his role as a criminal  
18 defense attorney -- of what he would anticipate  
19 Counsel would need. And I just was following  
20 up on that.

21          THE COURT: Okay.

22          Mr. Davis, did you have any final  
23 questions for Mr. Commisso?

24          MR. DAVIS: No questions, Your Honor.

25          THE COURT: Thank you. Okay.

1           Thanks, Mr. Commisso.

2           THE WITNESS: So should I let Mr. Meyer  
3 know that he's released?

4           THE COURT: Yeah, apparently so. No one  
5 wants to seem to call him. All right.

6           Your motion, Ms. Brown -- to try to keep  
7 this under control -- we can extend this longer  
8 if we need to, but why don't we try to restrict  
9 ourselves first to -- I'm going to say  
10 15 minutes; okay?

11           MS. BROWN: I think I can do that, Your  
12 Honor.

13

14                   CLOSING STATEMENT

15           MS. BROWN: What I've presented -- I  
16 actually put together a PowerPoint to organize  
17 some of the issues, and especially focus on the  
18 issues either that the Court presented to us  
19 prior to trial, or issues that have been more  
20 of a contention during the trial, and to focus  
21 on those. And, obviously, I can go faster or  
22 slower through the slides, depending on what  
23 questions the Court has about -- the Court may  
24 have more question about certain issues than  
25 about other slides.

1           So I had spoken with Charli about this  
2 before the hearing. So there's a way that she  
3 is -- she could share the screen with me and I  
4 could pull up the PowerPoint.

5           THE COURT: Sure.

6           THE CLERK: Okay. You should be able to  
7 now.

8           MS. BROWN: I'm getting a visual that  
9 John Meyer entered the waiting room, so I'll  
10 ignore that.

11           The right-hand side of the screen is  
12 mostly -- I wanted to set out the three issues  
13 that are in the motion to dismiss, which are  
14 the Brady -- I have split up the Brady  
15 violation issues, both into the billing records  
16 from the Government that they were in  
17 possession of, and the email exchanges and  
18 network scans. And the reason for this is one  
19 group of documents were in the possession of  
20 the Government, and one, arguably -- well, they  
21 didn't possess them.

22           The question is, are they responsible for  
23 the non-production? So that's why I divided  
24 those two issues. The third issue is the due  
25 process violation and failure to take steps to



1 preserve the IT information. So that's how  
2 I've divided them up.

3 THE COURT: Sure.

4 MS. BROWN: And for some reason, my screen  
5 is not advancing. Oh, I've got it now.

6 So I wanted to just put up -- the Court,  
7 obviously, knows the Brady test -- but  
8 different parts of this test apply to different  
9 documents. First part, being whether it's  
10 exculpatory, applies to everything.

11 The second part, of whether it was -- the  
12 Government either willfully or inadvertently  
13 suppressed the evidence, and then whether  
14 prejudice. So some of these apply more than  
15 others.

16 In terms of the Brady issue, there's two  
17 parts. Again, I'll just kind of skip through.  
18 So the billing records.

19 So these are the records that have the  
20 name "John Davis" on the top. They are  
21 addressed to the U.S. Attorney's Office. And  
22 the question on that is really two parts of the  
23 three-part test, which is whether they are  
24 exculpatory and whether they were prejudicial.  
25 The Government clearly had them. The

1 Government clearly did not turn them over. I  
2 know the Court asked some questions about  
3 whether they had to or not, and I'm going to  
4 address that shortly. So I just wanted to  
5 start off by -- I put up here what those  
6 documents looked like. On the left -- so I  
7 basically cut it in half.

8 On the left-hand side it says  
9 "John Davis," and it says the invoice for RSM.  
10 And it -- on the right-hand side, it lists the  
11 work done on the case, billed by hours.

12 So were these records exculpatory? So  
13 just to give a little bit of a breakdown of the  
14 timeline, the first notice and request for  
15 documents was July 22. And this is when  
16 defense counsel learns that Naviloff is going  
17 to be an expert for the Government. And they  
18 ask for reports prepared by RSM or its  
19 employees regarding loss calculation,  
20 explanation of methodologies used, and  
21 electronic data. And I -- where I can, I put  
22 the document number. And then there's another  
23 document request, October 18, by a defense  
24 counsel.

25 Well, actually, I think I took this from

1 the motion 47-4, where Attorney Harrington  
2 says, "The Government has not produced all  
3 documents that were available to and reviewed  
4 by Mr. Naviloff in preparing his opinion,"  
5 which ended up being correct. What's important  
6 here is what information is available to the  
7 Government that should have triggered them to  
8 believe that these billing records were  
9 exculpatory? And we can talk about prejudicial  
10 in a minute.

11 So just by having these records, the  
12 Government knows that Naviloff had billed us in  
13 25 percent of the time preparing the report for  
14 the Government. And the Government filed a  
15 responsive pleading stating that the Defense  
16 had everything Naviloff considered. Knowing  
17 that Naviloff had billed us in 25 percent of  
18 the time preparing the report, the Government,  
19 again, filed an attachment to the responsive  
20 pleading. That is actually Commisso's report  
21 that we talked about, where he said that they  
22 were working on producing all documents  
23 reviewed and assessed.

24 You know, I would add here, Your Honor,  
25 just what we didn't get from Commisso is "I

1 sent an email to RSM saying, 'Hey, I'm filing  
2 something in court saying that I'm working on  
3 producing all documents you reviewed and  
4 assessed. Please make sure I've done that.'"  
5 He didn't do that.

6 And you're like, "Well that's not his  
7 job." That's another problem here -- is the  
8 Government didn't do their job. And their job  
9 was to make sure that the Defendant got  
10 exculpatory evidence. And I'll get to that in  
11 a minute, but that email exchange you were  
12 asking about before, where Naviloff and  
13 Commisso were talking amongst themselves about  
14 what to turn over and what not to turn over --  
15 there's another part of that exchange, which is  
16 Exhibit L11, and I'll talk about it a little  
17 bit more.

18 But that -- so how we got some of these  
19 documents, you might remember from  
20 Attorney Commisso -- like, we'd get some  
21 documents that were redacted. And then he  
22 reviewed them again and unredacted some of the  
23 things he redacted.

24 And one of the things he unredacted is in  
25 Exhibit L11, where -- because we were trying to

1 figure out how it starts -- Attorney Hunter to  
2 Harrington; Harrington to Attorney Hunter;  
3 Attorney Hunter to Harrington. So it's a  
4 back-and-forth between counsel in the case.

5 Then, all of a sudden, the email pops over  
6 to Naviloff and Commisso, and we're like, "how  
7 did that happen?" And there was a missing  
8 email in the chain. And it was Attorney Davis,  
9 who forwarded those document requests from  
10 Harrington to Commisso and Naviloff. Well, why  
11 is that important?

12 When we look at Exhibit L11, when  
13 Attorney Davis forwards those email exchanges,  
14 which include defense counsel's document  
15 request, it says, "Gentlemen, this just in."  
16 And that really sums up the Government's role  
17 here.

18 They abdicated their role of, like, "Hey,  
19 you guys figure out what we need to turn over  
20 here," and they turn over the role of figuring  
21 out what's exculpatory to the lawyer for the  
22 alleged victim and to their expert witness, and  
23 didn't --

24 I mean, there's no guidance, like, "Hey,  
25 can you really make sure that you've got

1 everything you relied on, or analysis?"

2 I mean, a few minutes ago, Attorney Hunter  
3 said, "We were looking for all analyses." How  
4 do we know that?

5 We don't have an email where  
6 Attorney Hunter sends it to Mr. Naviloff,  
7 saying, "Hey, please give us any analysis you  
8 relied on." Because if he did, they didn't  
9 comply with it, because there's definitely  
10 analysis going on in these emails. And so if  
11 they asked for that, that's problematic.

12 So that's why they were on notice that  
13 these billing records were exculpatory. This  
14 email shows it a little bit more -- I've got  
15 the same side-by-side as before. Well,  
16 actually, no. This is the trial testimony of  
17 Naviloff.

18 And so the point I'm making with this  
19 slide -- it says, "While it was clear that the  
20 billing records were exculpatory before trial,  
21 it is abundantly clear that the billing records  
22 were exculpatory at trial." And so what  
23 happens is Attorney Harrington makes all these  
24 efforts to get to the bottom of Mr. Naviloff's  
25 opinions regarding the fraud evaluation issues.

1           And at trial he asks Mr. Naviloff -- I  
2           think what precedes this is that "you're not an  
3           IT expert." And then he asks him "and in this  
4           particular case, did you consult with any IT  
5           experts in writing your report?"

6           "I did."

7           "And who were those IT experts that you  
8           consulted with?"

9           "John Meyer, Diego Rosenfeld, and another  
10          couple of associates that report to  
11          Diego Rosenfeld."

12          So this is at trial. The Government knows  
13          that this is a billing they have. This billing  
14          on the right is from the time period when this  
15          report would have been written. There's no  
16          Diego Rosenfeld there. Now, Mr. Harrington  
17          doesn't know that, but the attorneys for the  
18          Government do. And if they were busy, not  
19          paying attention to the fact that what these  
20          bills -- but at trial, this became abundantly  
21          clear that they were sitting on exculpatory  
22          evidence that trial counsel could have  
23          impeached Naviloff with.

24          And that -- he's talking about  
25          "Diego Rosenfeld is a principal with over

1       20 years of experience," and he's not listed  
2       there as billing during that period, which  
3       would have been July 17, which is around the  
4       time Mr. Naviloff became an expert for the  
5       Government up until October 4. So this is a  
6       really important -- to the extent that they  
7       have some excuse for not turning over these  
8       records before trial, it is our feeling that  
9       these were exculpatory prior to trial. But  
10      they became very exculpatory.

11             And, yeah, I know it would be hard to stop  
12      a trial and say, "Wait a minute here. We've  
13      got exculpatory evidence. Now it's crystal  
14      clear that it's exculpatory," but that's what  
15      they had a duty to do. And they didn't do it.

16             And it even became worse because, in that  
17      same testimony that I just read, not only did  
18      Greg Naviloff list his IT testimony coming from  
19      Rosenfeld, he also listed it coming from Meyer.  
20      Now, the Government has sent a letter before  
21      trial saying that Mr. Meyer's -- they're not  
22      going to offer him as expert witness.

23             The other thing that's even -- I didn't  
24      even put this in my PowerPoint because we're  
25      learning this today -- is that there was a



1 stream of documents from Mr. Meyer to  
2 Mr. Naviloff that -- Mr. Commisso was out of  
3 that stream. And I'll come back to why that's  
4 important in a minute.

5 So the Government is at trial. Their  
6 expert witness is saying that these two IT  
7 experts were very important to his  
8 consultation.

9 And they're not stepping up to say, "Wait  
10 a minute. We've got some information that's  
11 not clear on that." And that's very consistent  
12 with what I said before -- is sort of a "hear  
13 no evil; see no evil. You guys figure it out"  
14 kind of thing, and "you send us whatever you  
15 want to send us."

16 So as I said, after this  
17 cross-examination, the Government knows that  
18 their key witness is not an IT expert, and that  
19 this key witness had consulted with a --  
20 consulted with a non-testifying IT -- well, it  
21 should be just "expert" -- well, I mean, if you  
22 consider other people at RSM. And this factor  
23 is not disclosed to Defendant.

24 Naviloff's claim, revealed at trial, that  
25 he consulted with an IT expert to inform his

1 opinions is not consistent with the billing  
2 records possessed by the Government. And the  
3 RSM billing records which were possessed by the  
4 Government would have materially impeached  
5 Mr. Naviloff, and they still did not turn them  
6 over.

7 I want to come to one of the Court's  
8 questions here.

9 THE COURT: Can you go back to that slide?

10 I just have to ask you. This is a heavy  
11 document trial. There's a lot of documents, a  
12 lot of discovery. I'm not sure I'm ready to  
13 accept that it would be clear the minute -- I  
14 agree, by the way, that the bill would have  
15 been a good cross-examination tool after that  
16 testimony. I'm not disputing that at all.

17 But I'm not sure I'm ready to hold the  
18 prosecutors responsible for not immediately  
19 realizing that this bill -- we don't even know  
20 why they didn't produce the bill, really. It  
21 could have been a conscious decision. It could  
22 have been inadvertent. But the idea that they  
23 would recall that and immediately recognize it  
24 as exculpatory and realize they had to produce  
25 it -- that seems like a lot to me.

1                   Why do you make that argument?

2                   MS. BROWN: Well, first of all, going back  
3 to the test that I set forth before,  
4 inadvertent means we win. That inadvertent  
5 disclosure can be a Brady violation.

6                   THE COURT: Sure. Doesn't mean you win.  
7 It means -- you know what I mean.

8                   MS. BROWN: Right, but it would satisfy  
9 that prong of the test. I should have said  
10 that.

11                   And there's lots of Brady cases out there  
12 where there were innocent reasons for not  
13 turning it over. Bundy. The Government didn't  
14 know about the documents in question -- that  
15 there was someone working for them that didn't  
16 produce or withheld the documents, but the  
17 actual lawyers for the Government didn't know  
18 about them.

19                   And, in fact, Bundy is a really good case,  
20 because what happened in Bundy is when they did  
21 learn about the documents, they said, "Stop,"  
22 and they turned them over in the middle of the  
23 trial in Bundy. This didn't happen here. And  
24 there are cases where the Government can kind  
25 of save themselves, if they turn -- well, say,

1 "That wasn't really clear it was exculpatory.  
2 Now that I see your defense, yeah, it's more  
3 apparent."

4 But I don't think we need to prove  
5 intentional. It can be inadvertent, but they  
6 -- I think you have to look at it cumulatively,  
7 which is what I talked about before -- that  
8 Exhibit L11, which is -- they had -- they had  
9 passed this off in terms of worrying what  
10 documents the Defendant got. They passed it  
11 off to Naviloff and Commisso.

12 And to the extent it was inadvertent,  
13 they're still to blame, because they had a role  
14 in finding exculpatory evidence as to their own  
15 expert witness when they were on notice. And  
16 that billing record put them on notice.

17 You're muted, Your Honor.

18 THE COURT: Thank you.

19 It's not that I disagree with the analysis  
20 you're giving. It's more that I just don't  
21 think -- in your papers, you have repeatedly  
22 accused him of intentional misconduct. And I  
23 don't think I'm as ready as you are to assume  
24 that, like, that bit of testimony from Naviloff  
25 immediately registered with them as something

1       that alerted them to a particular document they  
2       should have produced.

3               It's not that I disagree with your point  
4       about inadvertence or anything like that. It  
5       just seems to be a view of adverse counsel that  
6       attributes to them some degree of misconduct  
7       that I'm just not ready to find based on this  
8       evidence.

9               But you've got to make your argument, so  
10       go ahead.

11              MS. BROWN: Well, I think, Your Honor, the  
12       error -- they've got a responsibility to keep  
13       an eye out for this stuff. And they had this  
14       document. And, as I said, you've got to look  
15       at it cumulatively.

16              To the extent of being called -- being  
17       accused of being on a fishing expedition,  
18       repeatedly, and being accused of dilatory  
19       discovery tactics, defense counsel was  
20       persistent in saying, "We want to get to the  
21       bottom of this opinion," and they kept doing  
22       that. And the Government was on notice of  
23       that.

24              And they knew that -- and in these  
25       requests it says "or their coworkers or people

1       who work for RSM." Over and over,  
2       Attorney Harrington was trying to get to the  
3       bottom of this. And then they get this bill  
4       that has six people working on the case, and  
5       the one who's testifying bills less than  
6       25 percent.

7               That's just clearly a red flag here when  
8       you put that together. Alone, maybe it  
9       wouldn't have set off alarm bells; but with the  
10      Defendant's persistent request for getting to  
11      the bottom of Naviloff's testimony to be able  
12      to have ability to impeach him -- when you put  
13      that together, then it certainly put that --  
14      put them on notice. Or, as I said, we don't  
15      have to prove that it was intentional -- just  
16      that it was inadvertent.

17             THE COURT: Yep.

18             MS. BROWN: So the next slide has to do  
19      with some of the questions the Court posed.  
20      What is the authority for the proposition that  
21      the Government must or should turn over  
22      itemized expert bills?

23             And what we're saying is, we don't have to  
24      prove that they always have to turn over expert  
25      bills. I don't think that's what the law is in

1 discovery. What we're saying is, to the extent  
2 that expert bills are covered by work product  
3 or attorney-client privilege -- I think it  
4 would probably be more work product if it was a  
5 prosecution -- a prosecution still has a duty  
6 to disclose Brady materials, even if that was  
7 work product. So that is what applies.

8 It's also worth noting that in one of the  
9 -- I'm not sure if it's document 50 or 51.  
10 Actually, it's 50. I have it right there --  
11 50:6. They said that they had produced  
12 documents consistent or akin to Rule 26.

13 Rule 26 provides that billing records for  
14 a testifying expert are not work product. And  
15 that makes sense. I mean, how much somebody's  
16 getting paid is relative to their credibility  
17 and bias. So to the extent there was any  
18 concern that these records were covered by work  
19 product, and even -- it's not just a matter of  
20 turning over the record.

21 It should have clued them in to picking up  
22 the phone and talking to their expert witness,  
23 like, "Whose opinion is this?" And, "You've  
24 told us that this is your opinion, but there's  
25 a lot of people working on this case, and we

1       need to know that." And there was no  
2       curiosity, whatsoever, as to the basis of these  
3       opinions, despite repeated attempts to get to  
4       the bottom of it by defense counsel.

5               I wanted to mention this. There was -- I  
6       forgot if it was during the questioning of  
7       Mr. Sgro or Mr. Naviloff, but Attorney Le  
8       mentioned common sense.

9               And I think her question or statement was  
10       "it would be common sense that there would be  
11       emails in this case." And I think we need to  
12       put that in perspective. Because if you knew  
13       that six people worked on the expert report,  
14       and that Naviloff did less than 25 percent of  
15       the work on the report, yes, it would be common  
16       sense that there were emails among the team  
17       sharing their analysis and findings.

18              But if you didn't know that six people  
19       worked on the expert report, and you'd been  
20       told that you had everything Naviloff reviewed  
21       and considered, it would not be commonsense  
22       that much of the work and analysis had been  
23       done by others. So I think it's important to  
24       look through the lens of the information the  
25       Government had and the information defense



1           counsel had at that time.

2           They are exculpatory -- these billing  
3           records -- I'm still on the billing records --  
4           because the Court relied on Naviloff's  
5           testimony when it found that "the duplicate  
6           billing, failure to register services in some  
7           cases, the astronomically expensive markups  
8           established fraud."

9           They're also exculpatory because Naviloff  
10          was the only witness who testified as to these  
11          things -- the duplicate billing, et cetera.  
12          And if the Government had provided the billing  
13          records, it would have led to further discovery  
14          and the emails.

15          I mean, that's how this happened after  
16          trial -- is once we, as post-conviction  
17          counsel, saw the emails combined with the  
18          testimony, we knew what to ask for. We knew to  
19          ask for the emails. And those emails rendered  
20          additional exculpatory evidence that I'll talk  
21          about next, which is the emails -- mostly  
22          intra-RSM emails and the network scan.

23          And it's our opinion -- our position that  
24          they were favorable evidence to the Defendant,  
25          the Government willfully or inadvertently

1       suppressed the evidence, and that there is --  
2       and so I think what I put in this last bullet  
3       here -- "there's no Brady violation if the  
4       Government did not suppress the evidence." So  
5       since that's sort of the, for lack of a better  
6       word, the big issue, I'm going to address that  
7       first instead of going prong by prong.

8               And so it's our position the Government  
9       suppressed the evidence -- the RSM emails and  
10      network scans -- either willfully or  
11      inadvertently, when they represented the  
12      Defendant had everything RSM considered or  
13      reviewed. And I'll get to that in that minute  
14      in terms of those representations.

15             The key to understanding why the  
16      Government is responsible for the nondisclosure  
17      is the question that the Court also asked of  
18      the parties -- is what is the meaning of and  
19      reliance upon the Government's representations  
20      as to its disclosures of documents considered  
21      by Mr. Naviloff, and the existence of further  
22      documents of this nature?

23             And going back -- I mean, it sort of goes  
24      to your comments a few minutes ago, Your Honor,  
25      about not believing that the Government did

1 this intentionally, or willfully, or  
2 maliciously. Again, we don't have to prove  
3 that.

4 Let's just look at it as inadvertently and  
5 maybe add the word "reckless" or "negligent" in  
6 there. So going back to what we said before,  
7 they've handed off this duty. Now, if you're  
8 going to put in a motion that Defendant has  
9 everything that RSM reviewed and considered,  
10 you should check on that.

11 You should pick up the phone and say,  
12 "Hey, Mr. Naviloff, I've got to respond to  
13 this. And I'm going to put in this motion I  
14 have everything that you reviewed -- any  
15 analysis." That's what they said -- they said  
16 they asked for analysis. "Do I have all that?"

17 Hopefully, Mr. Naviloff would have been  
18 honest enough to say, "Well, there was some  
19 internal analysis. There was some internal  
20 documents. We've got these network scans --  
21 it's, like, 40 tabs of them." That didn't --  
22 we assume, even giving the Government the  
23 benefit of the doubt and looking at it in a  
24 light most favorable to them, they were  
25 negligent, because they put these statements in

1 a motion that we now know just aren't accurate.

2 And even if they did it inadvertently --  
3 even if they did it without double-checking,  
4 they're still responsible, because that pretty  
5 much sent the Defendant -- he's, like, "Okay.  
6 I guess I got everything, because they've said  
7 I've got everything he considered."

8 This is a list of cases. And we talked  
9 last week of doing the supplemental motion. I  
10 will put them in that supplemental motion of  
11 where -- why it's significant that the  
12 Government made representations regarding what  
13 they produced, and what they didn't produce,  
14 and why that's important to the Brady analysis.  
15 I'm not going to go through every case here,  
16 but we will include this information. But  
17 there is case law supporting our analysis that,  
18 again, with the Government, inadvertently makes  
19 -- it suppresses evidence. And we're saying  
20 they suppressed it by making these  
21 representations.

22 These also go to the information about  
23 the -- why the Defendant didn't file a Rule 17  
24 subpoena as well. Again, he was told  
25 repeatedly -- what is interesting here on this

1 issue, Your Honor, at least how I'm  
2 understanding them -- and I've learned a lot  
3 from this hearing. But at least how I'm  
4 understanding things, the Government was  
5 passing this off to Naviloff and Commisso.

6 But we're not sure what guidance -- again,  
7 we know Commisso is putting in an affidavit or  
8 declaration that he was going to check to make  
9 sure the Defendant had everything that was  
10 reviewed, but he can't say that he passed that  
11 along to RSM.

12 And we haven't heard any evidence that the  
13 Government passed along to RSM, "Hey, we're  
14 filing a motion saying we've -- we're turning  
15 over everything you considered or reviewed,  
16 including consulting with internal IT experts."  
17 So the Government can't save themselves from  
18 this by having -- for having a hands-off  
19 approach to discovery or finding exculpatory  
20 evidence.

21 This is even more dense, and I know it's  
22 hard to read. This is a list, and we will  
23 include it --

24 THE COURT: Go back to the last slide,  
25 please.

1 MS. BROWN: Sure.

2 THE COURT: Okay. Thank you.

3 MS. BROWN: And I want to emphasize that  
4 there's been all sorts of parsing of words on  
5 this, whether "relied" or "considered."

6 To the extent that you take the word  
7 "relied" as being -- looked at it, decided it  
8 wasn't important, it's important to remember  
9 that Attorney Commisso, in that affidavit that  
10 was attached to the Government's motion, said  
11 "reviewed."

12 And there's -- "reviewed" means looked at,  
13 even if you didn't find it important or  
14 whatever.

15 THE COURT: I view that as "relied."  
16 "Relied" is anything the expert saw. Because  
17 disregarding is the same as considering.

18 MS. BROWN: Exactly.

19 And so the next is just a compilation of  
20 the representations. I think most of this  
21 comes from our motion. We will include this  
22 list. But it's very -- as I say, if you just  
23 focus on that affidavit -- I'm sorry.

24 This slide is about the misleading  
25 representations -- the significance of that.

1 And we've found several cases -- in fact,  
2 Badley, which -- this isn't new case law --

3 "In reliance on the misleading  
4 representations, the Defendants might abandon  
5 lines of independent investigation" -- in this  
6 case we would say "filing a subpoena --  
7 defenses or trial strategies that would have  
8 pursued." So this is very basic law that the  
9 representations are really key to the  
10 Government's role in the suppression of this  
11 evidence.

12 And I also want to compare here -- if  
13 there's any doubt that this is exculpatory, I  
14 sort of will rely on the emails themselves.

15 Because this is one particular email from  
16 Fitzgerald to Naviloff where they're having  
17 this conversation about how "we need a  
18 substantive meeting with Diego to get him in  
19 the loop. I'm a bit worried now that we are  
20 communicating with the United States Attorney's  
21 Office and relying on Ryan, who is only a newly  
22 promoted senior associate."

23 So RSM knows it looks bad to have Gilpin  
24 being the only one who is supplying the IT  
25 analysis in this case. And, so -- and what's

1 real important is -- maybe this makes a point  
2 better than my previous slide of how Naviloff  
3 was spinning here.

4 He has this internal email about "we've  
5 got to bring the senior guy on board because  
6 most of our IT work was done by Ryan Gilpin."  
7 And then at trial, when he's asked about his IT  
8 expert, he goes, "Oh, Diego Rosenfeld is a  
9 principal with over 20 years of experience."  
10 He's trying to sell the value of his report.  
11 He wants to be a good expert.

12 Understandable, but it was testimony where  
13 the Defendant was denied an ability to use very  
14 -- to have the team -- the RSM team admitting a  
15 weakness in their analysis, and the weakness  
16 being that they had a more junior associate  
17 working on the case. That would have been  
18 powerful. And I think that the prejudice prong  
19 is easily satisfied by what the Defendant could  
20 have cross-examined versus the fact that he  
21 didn't have the ability to do that because this  
22 was not turned over.

23 Another analysis here is -- it's not just  
24 about impeachment. The Kyles v. Whitley case  
25 talks about that "the suppressed evidence could



1 have discredited the caliber of the  
2 investigation." I know -- you may remember  
3 some of the questioning -- in the previous  
4 hearings, we talked about emails where they  
5 were looking for an IP address to establish  
6 venue, looking for restitution information,  
7 talking about whether, if they pursued a  
8 certain strategy, the Defendant would get the  
9 information in discovery.

10 They were asked to create documents for  
11 the Government -- "documents" meaning, like, an  
12 analysis or a spreadsheet, I think is what  
13 Commisso testified to.

14 So if defense counsel had had all this  
15 information, that would have clearly  
16 discredited the caliber of this investigation  
17 of -- they've already got a witness who's  
18 working both sides -- well, I don't want to say  
19 sides of the fence, but had worked for RSM, the  
20 alleged victim, and now is going to work for  
21 the Government. And that in his role for  
22 working with RSM, that that witness or team of  
23 witnesses were talking about how to help the  
24 Government. And this goes back to the summer  
25 of 2018.

1           This information was exculpatory. And  
2           this is -- yeah, this is a better -- this is  
3           the emails about -- and this is November 7. So  
4           this is before Mr. Alrai is even indicted. And  
5           I think this is after one of the meetings with  
6           the U.S. Attorney's Office.

7           So there's much more to this email, but  
8           there's a back-and-forth about this meeting  
9           with the U.S. Attorney's Office. And part of  
10          that discussion is consideration of the net  
11          worth method. The reason that they suggest  
12          this is using this method would put out of play  
13          the opportunity to dispute market valuations  
14          and complex IT issues.

15          Well, guess what the Government did? And  
16          this is right from their reply motion to our  
17          motion to dismiss. They're saying that the  
18          non-disclosed evidence wasn't prejudicial  
19          because they still had the personal enrichment  
20          analysis, and it had nothing to do with the IT  
21          issues, and it was completely unrelated to the  
22          work RSM did for United Way UWMB.

23          Well, it's not completely unrelated,  
24          because while Naviloff is still -- and  
25          Fitzgerald -- are still working for United Way

1 in November of 2018, they're trying to see how  
2 they can help the Government's case be --  
3 defend against disputes as to market valuation.  
4 And that's what happened at trial from the  
5 previous emails.

6 Attorney Harrington is trying to attack  
7 Naviloff of, like, "Hey, you're not an IT  
8 expert. How can you come in here and say that  
9 this software is the same as this software, or  
10 this IT application is the same as this IT  
11 application, or there were duplicate billings  
12 or services not rendered? How can you  
13 calculate the loss on something that you don't  
14 have any underlying expertise?"

15 So what -- this is proof that RSM and  
16 Naviloff -- and this could have been used  
17 against them -- that they helped come up with  
18 the Government's plan to not just rely on  
19 market value and to look at personal  
20 enrichment. So that, I think, is another  
21 reason why this evidence would have been -- the  
22 nondisclosure was prejudicial. I think that's  
23 a better way I want to say that.

24 We've heard a lot about document scans,  
25 Your Honor. And I mentioned this during the

1 cross-examination of Mr. Commisso. And as I  
2 said, we learned today -- and I just want to  
3 clarify what happened.

4 So you can see on this -- it's basically a  
5 screenshot where it says -- at the bottom, you  
6 can see -- the tabs aren't active because it's  
7 a screenshot, but it'll say user's identity,  
8 service account, security groups, group  
9 policies. So if this were the actual Excel  
10 document, I could scan through that. There  
11 would be 40 tabs. And this is at Uuu -- were  
12 the actual Excel document. So this is  
13 something that was turned over after trial.

14 We assumed that it came from  
15 Attorney Commisso. Because based on what we  
16 had had or the information we had, he was --  
17 information was coming through him, document  
18 requests were sent to him based on the letters  
19 we talked about before. And so what happened  
20 is this network scan was produced after trial.  
21 What was produced prior to trial was one of  
22 these tabs. So probably not an exact  
23 measurement, but about 140th of what we got  
24 after trial.

25 And so the question -- and I was asking

1 Attorney Commisso about this, because he had  
2 testified, like, "As far as I know, nothing  
3 that came from United Way that was exculpatory  
4 wasn't turned over to the Defendant."

5 And I asked him about the network scan,  
6 and he's, like, "Well, I'm not really familiar  
7 with what's on there."

8 And so this is a quote from Meyer's  
9 testimony where -- I think this is the  
10 question: "When you got there," number five,  
11 "you were not able to find a password  
12 expiration policy?"

13 "Yeah, there wasn't an expiration policy  
14 and the complexity of the passwords were weak."

15 So from this network scan that we get  
16 posttrial, we find information about the  
17 passwords, and whether there's password --

18 So it says, "Password last set. Password  
19 expires." And that's under one of the tabs  
20 that was not turned over to us prior to trial.

21 Another example from the posttrial  
22 scanned -- another quote from Mr. Meyer, "Okay.  
23 And also when you got there," number five --  
24 oh, actually, I did that one already. Oh.  
25 It's the same quote about the complexity of the

1 passwords.

2 So part of this scan under "password  
3 strength assessment" -- the red is added by us  
4 just to make it clear -- as part of the scan  
5 that was run, it says "strong security, strong  
6 security" -- I won't read it all the way down,  
7 but that would have been something that we  
8 could have impeached Meyer's statement about  
9 the passwords being weak. We could have  
10 impeached him with this network scan that was  
11 not turned over.

12 THE COURT: Is it not turned over? Is it  
13 reviewed by Meyer and/or Naviloff and not  
14 turned over? Or is it never reviewed? I can  
15 see an argument either way, but I'm trying to  
16 figure out which it is.

17 MS. BROWN: See, that's the thing, Your  
18 Honor. As I understood the Government's  
19 proffer and Commisso's testimony, that there  
20 was some exchange of -- so as I understood it,  
21 this 40-tab Excel network scan that was not  
22 produced until after trial was -- came directly  
23 from RSM. And I would invite the Government to  
24 correct me if I'm wrong, but that's how I  
25 understood their proffer earlier. And this

1 came from RSM after your discovery order this  
2 summer, August-something. And this was  
3 produced.

4 I asked Attorney Commisso about it -- that  
5 I was assuming everything was getting funneled  
6 through him to do whatever data security  
7 investigation -- or data security analysis as  
8 to the privilege. As I understood his  
9 testimony, this didn't go through him. This  
10 came straight from RSM posttrial.

11 So that's -- if I, again, understood  
12 Attorney Commisso's testimony, this must have  
13 come directly from Mr. Meyer to Mr. Naviloff as  
14 part of the RSM analysis.

15 THE COURT: So it was that stream unknown  
16 until today, in other words; right?

17 MS. BROWN: Exactly.

18 THE COURT: But it's your understanding  
19 that Naviloff saw this before trial, or didn't  
20 see it? Either way, you can criticize, but  
21 which is it?

22 MS. BROWN: Well, there's an email that we  
23 talked about earlier, and I can find that,  
24 where Meyer is sending -- it's either Meyer is  
25 sending it to Gilpin, or Gilpin's sending it to

1 Meyer, but there's a back-and-forth on that  
2 email. And Commisso cc'd -- remember I asked  
3 Commisso about it?

4 Like, "Hey, this network scan was  
5 forwarded from between Gilpin and Meyer, and it  
6 says 'network scan' on there, and you're  
7 copied."

8 And he was like, "Well, I wasn't really  
9 paying attention to it. I was just copied on  
10 it. That was kind of between Gilpin and  
11 Meyer."

12 So there is evidence that they -- that  
13 Meyer -- goes back to before. He had access to  
14 it. He's forwarding it to RSM. So I think  
15 that's enough to make a connection that this is  
16 information he had that he thought was --  
17 either Gilpin's asking him to consider or, the  
18 way I understood the email is, he was asking  
19 Gilpin to consider it. So if he's forwarding  
20 it to Gilpin then --

21 THE COURT: Yeah, I get it. I get it. I  
22 understand. I'm asking -- maybe the  
23 prosecution knows.

24 Is this information that anybody at RSM  
25 actually reviewed?



1           In other words, would Attorney Brown or  
2           Mr. Harrington's cross have been, "How can you  
3           say it's weak passwords, having reviewed this?"

4           Or is the cross, "You didn't even bother  
5           to review this"? Which is it? Do we know if  
6           Naviloff or someone on his staff actually saw  
7           this, Mr. Hunter?

8           MR. HUNTER: (Inaudible).

9           THE COURT: Time out. Your audio is,  
10          like, beyond bad.

11          MS. LE: I think he might be frozen,  
12          Judge.

13          THE COURT: Yeah. He keeps freezing and  
14          unfreezing.

15          MR. HUNTER: Is this better, Your Honor?

16          THE COURT: Yeah.

17          MS. LE: Much better.

18          THE COURT: You remember my question?

19          MR. HUNTER: Yes. Basically, did someone  
20          from RSM see this document? The short answer  
21          is yes, as I understand it. And then I can  
22          explain my understanding of where this document  
23          came from.

24          THE COURT: So, wait a minute. So RSM saw  
25          this before trial; right?

1 MR. HUNTER: Yes.

2 THE COURT: But it wasn't produced  
3 pretrial?

4 MR. HUNTER: Correct. What happened, Your  
5 Honor, is the Government learned that there  
6 were two network scans, one done by John Meyer.  
7 And what we had understood before trial was RSM  
8 had a separate network scan that they had for  
9 their analysis.

10 We asked for both of those network scans  
11 before trial, and we thought that we had  
12 produced them. One is the 62-page PDF  
13 document, and the other is the one tab from  
14 this spreadsheet that Ms. Brown is referring  
15 to. And we asked for them from the respective  
16 parties and we thought that we had them.

17 THE COURT: I see.

18 MR. HUNTER: After trial -- well, through  
19 this litigation, we learned that there was this  
20 larger spreadsheet that had more tabs than just  
21 the one that we had. I requested it from RSM  
22 and produced it to defense counsel. And so  
23 that's the timeline of what happened here in  
24 regard to this network scan.

25 Just to be very frank and candid, if we

1 had it before trial, we would have produced it.  
2 We wanted to produce the network scans that RSM  
3 had before trial.

4 THE COURT: All right. So you explained  
5 to me why you didn't have it, and I understand.

6 Do you concur with me? I view this as  
7 something that is colorably impeachment  
8 material -- to cross-examine Meyer and/or  
9 Naviloff.

10 Do you agree or disagree?

11 MR. HUNTER: Yes, Your Honor, I agree. I  
12 think there are reasons why that might weaken  
13 the impeachment. But, yes, if I were a defense  
14 attorney, I would want this to cross-examine  
15 both of those witness.

16 THE COURT: All right. Thank you.

17 Go ahead, Ms. Brown.

18 MS. BROWN: And just to clarify that  
19 there's no doubt about this --

20 THE COURT: I'm not saying there's any  
21 doubt about this.

22 MS. BROWN: Well, I just want to clarify  
23 what this document is, Your Honor. On the  
24 left, we took a screenshot from an actual email  
25 from Ryan Gilpin.

1           So Ryan Gilpin goes to the document on the  
2 right, takes this information, takes a  
3 screenshot, puts it in an email that he shares  
4 with the team, saying, "Hey, look at this." So  
5 there's no question that -- it's not even about  
6 had access to it.

7           It was, like, a "Hey, look at this. This  
8 is important" kind of email. So that there's  
9 just no question that RSM and Meyer had access  
10 to this. This is that same scan that was being  
11 shared.

12           So, finally, to the third part, which is  
13 the due process violation. I'm not going to  
14 spend a lot of time on that. We have outlined  
15 that fairly well in our motion.

16           THE COURT: I have to kind of apologize to  
17 you for this. Because it was -- failure to  
18 preserve evidence is obviously a very obvious  
19 due process violation. And for whatever reason  
20 -- and you briefed it, by the way -- for  
21 whatever reason, I was somehow stuck on, like,  
22 a civil discovery freeze situation, which is  
23 similar to this, because a request was made.

24           But, yeah, I guess what I was saying to  
25 you, though, last week was, "What's the legal

1 basis for this?" And I was sort of getting all  
2 huffy about it. It's obviously got a legal  
3 basis. I'm not sure if you can make the case,  
4 but it's a clear body of law, and I get it.

5 MS. BROWN: But it actually is very  
6 similar to the idea of spoliation in civil  
7 cases, which is you -- you're the party  
8 bringing this case, and you were in a position  
9 unique to make sure something valuable didn't  
10 get destroyed.

11 So it's a simple argument, but, obviously,  
12 there's a constitutional due process dimension  
13 here. And that's what we're arguing. And  
14 that's why I asked some of the questions of  
15 Attorney Commisso. I mean, there's no question  
16 this investigation began in May. Now we're  
17 hearing it began before that.

18 But at least as to United Way, there's no  
19 question that computer data was key to this  
20 case -- that finding out what happened in this  
21 case was key. And the Government chose the  
22 path of letting Attorney Commisso, and then  
23 later RSM, decide what they get and what they  
24 don't get. As the Government, they could have  
25 asked for things to be preserved. They could

1 have asked for documents from their computers.  
2 And that's done all the time that -- think  
3 about child pornography cases, where they get  
4 subpoenas to go in and get things from a party.

5 So they didn't do that. They chose not to  
6 do that in this case. And that -- the case I  
7 was referring to is the Cooper case, that they  
8 can't just blindly allow a third party not to  
9 preserve evidence. And as I said, I think  
10 we've articulated that fairly well.

11 THE COURT: Wait a minute. We've gone  
12 90 minutes, so I wanted to give the reporter a  
13 break.

14 MS. BROWN: Oh, sure.

15 THE COURT: But let me ask you one  
16 question before that.

17 Given the timing of how this all lined  
18 up -- your due process argument -- so what is  
19 the evidence that the Government either  
20 permitted or blindly allowed it? I'm not sure  
21 I've heard that.

22 MS. BROWN: Yeah. The FBI was involved in  
23 the case in the end of May.

24 Attorney Commisso said there was -- he  
25 didn't like the word "coordination." There was

1       some communication between him, and the  
2       Government, and the FBI as to this June 12 -- I  
3       mean, June 12 is going to be the key date when  
4       this data would become important. So  
5       Mr. Alrai's not there anymore. And so they  
6       would want to, as close to that date as  
7       possible, figure out what's in the IT  
8       environment.

9               And so they -- Attorney Commisso talked  
10       about there being communications about the FBI  
11       knowing about that meeting, and even being  
12       outside to hand a subpoena to Mr. Commisso.  
13       The thing is, why would the FBI want to be  
14       there on the day that he's learning there's  
15       this investigation? Well, because he might go  
16       home and destroy something; right? They're  
17       being smart about this.

18              Like, if this guy just knows that he's  
19       been questioned about his role -- potential  
20       fraud or misconduct, as the FBI, they're like,  
21       "Okay. We want to make sure that he can't go  
22       mess with any evidence. We're going to give  
23       him a subpoena or a warrant right way, so that  
24       we can prevent that." And they didn't do that.  
25       They didn't trust Mr. Alrai, but they trusted

1 United Way to preserve evidence that didn't get  
2 preserved.

3 So that's -- there's no email or document  
4 that said, "Boy, it would really be nice if  
5 you, like, didn't preserve this." Obviously,  
6 that's not what we're saying. We're saying  
7 it's neglect.

8 THE COURT: All right. Look, it's been a  
9 little over 90 minutes, so we'll take the  
10 afternoon break. I'm sure the United States  
11 will have a response to the argument you just  
12 made about preservation. And we will  
13 reconvene -- you can finish up your argument,  
14 Attorney Brown, at 3:10.

15 (Recess taken at 2:55 p.m., and the  
16 proceedings resumed at 3:11 p.m.)

17 THE COURT: Attorney Brown, you were on  
18 your due process spoliation argument.

19 MS. BROWN: Actually, I think I'm done  
20 with this slide.

21 The remaining, I think, four slides that I  
22 have, I've attempted to address some of the  
23 questions that the Court posed prior to the  
24 hearing. And they may have been answered, but  
25 I'll just go through them quickly.



1           One is authority for the proposition that  
2           the Government must or should turn over  
3           itemized expert bills or expert's internal  
4           communications, documents, indicative of  
5           expert's deliberative process. And I talked  
6           about that a little bit earlier -- that if it's  
7           Brady, they've got to turn it over, regardless  
8           of whether it's work product. So we're not  
9           saying they have to turn it over in every case.

10           But there's also plenty of case law that  
11           talks about that these things are relevant.  
12           Your Honor has expressed this already about  
13           if -- in fact, almost same as what you said --  
14           rejected documents could be more important to  
15           cross-examination than documents actually  
16           relied on. And there's support for that  
17           finding that the relevance of funds, documents  
18           considered and not used -- all of that is  
19           relevant. So that, I don't think, is a barrier  
20           to our Brady argument.

21           Another question the Court posed is the  
22           effect on the Defense of Attorney Commisso's  
23           involvement in the prosecution. We've argued  
24           that there's cases that say while ordinarily --  
25           and we agree with this -- ordinarily, a

1       third-party -- the Government's not  
2       responsible. I guess a better way to say it  
3       is, ordinarily, Brady does not apply to third  
4       parties, even if those third parties helped the  
5       prosecutor in the case. And the Government  
6       sets out all those cases. We agree with that.

7               But as the Blaszczyk (phonetic) case and  
8       the other cases cited in our motion say, this  
9       is a case-by-case, factual analysis. I think  
10      it would be an understatement to say that this  
11      case is unique and unusual. Very rarely do you  
12      have a witness who's being paid by both the  
13      alleged victim and the Government in the same  
14      case. It's unusual in terms of the role that  
15      both the expert witness and the lawyer for the  
16      alleged victim played in discovery.

17             But it still comes down to Government  
18      conduct. And the Government conduct in this  
19      case is them turning over the reins to other  
20      parties, and not exercising their duty to  
21      review the evidence. And it's -- that email  
22      you brought up earlier --

23             When you combine it with Exhibit L1,  
24      there's nothing there except the Government  
25      saying, "Hey, you guys work it out" -- two

1 people who have an interest in the case. And  
2 the Government obviously has an interest in the  
3 case, but they also have an ethical obligation  
4 to do justice that Attorney Commisso didn't  
5 have in this case, and Mr. Naviloff certainly  
6 didn't have.

7 Commisso's role also is that he used the  
8 privilege as a sword and a shield. He said  
9 that he didn't withhold anything relevant to  
10 Naviloff's loss calculation, but we pointed out  
11 that there's hundreds of emails that he has  
12 marked as privileged involving Mr. Naviloff,  
13 and that he has redacted documents where  
14 there's obvious discussions of loss calculation  
15 involving Mr. Naviloff. So he has withheld  
16 documents.

17 Also, another analysis here is that there  
18 is evidence that Commisso and RSM were  
19 assisting the Government's investigation way  
20 before Mr. Alrai was even indicted. We've  
21 talked about the emails involving helping the  
22 Government establish venue, rebut expected  
23 arguments regarding market value, increasing  
24 loss amounts, finding assets for forfeiture and  
25 restitution, potentially shielding exculpatory

1 evidence. And instead of exercising scrutiny  
2 towards Commisso's zealous efforts to obtain a  
3 conviction against Mr. Alrai, they either  
4 joined in his zealous efforts or took a  
5 hands-off attitude, I would add to that.

6 The role of IT expertise in development of  
7 Mr. Naviloff's expert opinion, and the evidence  
8 of who provided this -- I mean, it boils down  
9 to it -- and I know these questions are posed  
10 prior to the hearing, so you may have answer to  
11 all that. But it's certainly uncontested that  
12 Mr. Gilpin did most of the work. The Court has  
13 seen emails where he's doing findings and  
14 analysis. Those are the words of RSM -- not my  
15 words.

16 So this is certainly not just, like, "Hey,  
17 let's have a meeting on Tuesday" kind of  
18 emails. These are emails where there's  
19 analysis and findings shared, and analysis from  
20 another expert. And we talked about just a few  
21 minutes ago -- Gilpin was reviewing network  
22 scans and analyzing that, along with Meyer, to  
23 determine whether certain services were  
24 rendered in this case.

25 Diego Rosenfeld, the person Naviloff

1        claimed -- so it's not just the billable hours  
2        from Rosenfeld. If you look at all these  
3        emails where they're discussing findings, he's  
4        not in most of them. There's a couple that  
5        he's in where he's cc'd, but most of them are  
6        from Mr. Gilpin, which would have provided  
7        great fodder for cross-examination and was  
8        prejudicial to the Defendant's case.

9            And the fourth question the Court had  
10       posed is the meaning of the reliance. I think  
11       I've probably addressed that. I just would  
12       note one other particular case, the McCambridge  
13       case, noting the failure to respond completely  
14       to a specific discovery request suggests to the  
15       Defendant that such evidence does not exist and  
16       can amount to a misleading representation.  
17       And, again, you don't have to find misconduct  
18       on the part of the Government for this.

19            And that was one of the -- in the Bundy  
20       case that we talked about, that was one of the  
21       issues that was discussed, is that there had  
22       been representations that -- to the Defendant  
23       that he had everything. Or he had tried to get  
24       specific things, and it had been represented to  
25       him that he had everything. And, so,

1           therefore, he may have abandoned lines of  
2           defense, lines of argument, or theories of the  
3           case. And that's our argument as well. So  
4           that is the end. I'm going to stop the share.

5           And I am done, Charli.

6           THE CLERK: Thank you very much.

7           THE COURT: Can you submit that slide  
8           presentation, please?

9           MS. BROWN: Yes, I will do that, Your  
10          Honor.

11          THE COURT: Somebody, I'm sure, is  
12          handling the argument for the prosecution, so  
13          please proceed.

14          MR. HUNTER: Yes, Your Honor. And I will  
15          try to be close to my computer, but please let  
16          me know, and if the court reporter could let me  
17          know, if you can't hear me.

18          THE COURT: Yep.

19  
20                           CLOSING STATEMENT

21          MR. HUNTER: So I'll just start -- defense  
22          counsel made several -- argued several times  
23          that she doesn't need to prove that the  
24          Government intentionally did anything. But  
25          just trying to remember, at its core, what is

1 the Defendant's motion about? It is a motion  
2 to dismiss for prosecutorial misconduct.

3 And the first term has been very clear:  
4 "The sanction for dismissing an indictment  
5 after a Defendant's been convicted of an  
6 offense is employed only in truly extreme cases  
7 of egregious prosecutorial misconduct."

8 Similarly, the failure to preserve cases  
9 that the Defendant cites require showing  
10 Government bad faith. Egregious conduct is  
11 what we're talking about here. And the  
12 Defendant's failed to meet his burden that the  
13 Government's conduct here is so egregious, so  
14 truly extreme, as to require dismissal of the  
15 indictment. In essence, what the evidence here  
16 shows -- the Government took steps to try to  
17 identify and produce documents pursuant to  
18 Defense discovery requests.

19 Now, another argument that the Defendant  
20 made is that the Government essentially  
21 outsourced this or passed this off to RSM and  
22 United Way. But as was discussed in a lot of  
23 the pretrial litigation, the Government had to  
24 talk with RSM and United Way, because the  
25 Defendant was asking for documents that were

1 not in the Government's possession or control  
2 under Rule 16, or as that's understood for  
3 Brady purposes. So the Government reached out  
4 to the parties that had the documents or might  
5 have the documents that the Defense was  
6 requesting.

7 And as the Court's noted, there was the  
8 added complexity, because the Government did  
9 retain RSM to perform its loss analysis, of  
10 making sure that when RSM was producing  
11 documents to the Government, that it was not  
12 producing something that United Way hadn't  
13 waived privilege on. For example, related to  
14 the data breach investigation.

15 And so the correspondence -- a lot of the  
16 correspondence that defense counsel cites,  
17 where the Government is forwarding discovery  
18 requests to defense counsel, are showing just  
19 that -- that the Defendant's asking for  
20 documents the Government doesn't have, and the  
21 Government is forwarding those requests to the  
22 parties that do.

23 One of the documents cited -- it's  
24 Government Exhibit 21, but I think defense  
25 counsel has it as a separate exhibit -- is an



1 example of this, where Mr. Harrington had an  
2 October 11 letter requesting a number of  
3 things, including RSM's work papers. And  
4 Mr. Naviloff wrote a response responding to  
5 that about whether or not RSM had it, what they  
6 had, what they didn't have, what they produced,  
7 what they didn't produce. And the Government  
8 sent that response to defense counsel.

9 So, again, what the Defense is essentially  
10 trying to do is use the Government's and the  
11 victim's willingness to expedite things, to try  
12 to produce things without going through a  
13 formal Rule 17 process, against us. We reached  
14 out to the parties that had the documents, and  
15 then we produced them if we received them.

16 THE COURT: Yeah.

17 MR. HUNTER: And the question here is, is  
18 this -- so that goes to the prosecutorial  
19 misconduct argument -- is essentially, the  
20 Government didn't do anything to try to hide  
21 the ball here. We worked hard to try to find  
22 everything that Defendant was asking for,  
23 that -- everything that Mr. Naviloff considered  
24 and relied on. And we tried to find that and  
25 get it to the Defendant before trial.

1           And so I think the Defendant fails to show  
2           egregious Government misconduct that warrants  
3           dismissal of the indictment. But the basis of  
4           the motion primarily is Brady. And so the  
5           question is, is any of this newly discovered  
6           evidence -- Brady based on newly discovered  
7           evidence?

8           So the question is, is any of this newly  
9           discovered evidence Brady? And for that, the  
10          Defendant needs to show that not only is it  
11          exculpatory because it's helpful for  
12          impeaching, but that it's material, in that  
13          there's a reasonable probability that the  
14          evidence would have changed the result. And  
15          I'm putting the First Circuit Joslin (phonetic)  
16          case, which we cite extensively in our  
17          briefing. And the Defendant needs to show that  
18          the Government suppressed it; that the  
19          Government had the material and didn't produce  
20          it. And the Defendant has to prove that he was  
21          prejudiced by not receiving this material.

22          So just beginning with the suppression  
23          point -- and, again, we've briefed it. But I  
24          think the case that the Defendant hasn't really  
25          contended with is the U.S. v. Joslin, which is

1 a First Circuit case coming out of this  
2 district that involved a cooperating  
3 corporation that was cooperating with the  
4 Government's investigation.

5 The AUSA made some form of public  
6 statement, according to the opinion, that the  
7 corporation was part of the Government's team.  
8 The First Circuit assumed for purposes of its  
9 analysis that the corporation wrote the  
10 Government's prosecution memo and did research  
11 to establish venue -- so far more than even was  
12 being alleged here with John Commisso.

13 And in that case, the First Circuit held  
14 that the knowledge of that cooperating  
15 corporation is not imputed to the Government  
16 for Brady purposes. Those documents that are  
17 in the possession of that cooperating  
18 corporation are not in the Government's  
19 possession and control for purposes of Brady.

20 And the Government cites a similar line of  
21 cases regarding experts. Where, again, it  
22 boils down to -- is the expert an arm of the  
23 prosecution? And defense counsel alluded to  
24 some of these cases. But, there again, it --  
25 the question is, is the Government using the

1 expert for their area of expertise to testify  
2 for their area of expertise? And here we asked  
3 Greg Naviloff to do these two accounting  
4 analyses. Or, is the Government using the  
5 expert, essentially, as an agent? Which,  
6 again, I briefed the issue. I won't repeat it.  
7 But only here -- the evidence is the Government  
8 used RSM as an accounting expert. That's what  
9 we put Greg Naviloff on the stand for. That's  
10 what we asked him to do. And that's what he  
11 testified to.

12 And, so, again, everything that RSM knows  
13 can't be imputed to the Government for Brady  
14 purposes either. So the Government cannot  
15 suppress what it doesn't have. And for that  
16 reason alone, the Defendant's argument fails as  
17 to there being a Brady violation.

18 Just a couple of points just to address  
19 what defense counsel brought up in her  
20 summation. She mentioned this new stream of  
21 Meyer -- documents from John Meyer. I just  
22 point the Government to ECF Number 50, page  
23 nine, footnote ten, which was a pleading the  
24 Government filed when we were talking about  
25 this exclusion of Greg Naviloff's testimony.

1           And, basically, there -- what the footnote  
2           says is basically, as we were conferring with  
3           RSM about this motion, we learned that they had  
4           emails from John Meyer that bore on his  
5           analysis. So we asked them for them. And we  
6           determined some of them had already been  
7           produced, and we produced the ones we didn't  
8           have. So, again, the point here is, again,  
9           that the Government, when we learned or had  
10          reason to know if some form of document that  
11          was -- that Greg Naviloff might have viewed, or  
12          relied on, or considered, we sought it out and  
13          produced it.

14          So the next element of the Defendant's  
15          burden is showing that the newly discovered  
16          evidence is material. And here, the First  
17          Circuit -- there's a number of cases, again,  
18          cited in our brief -- that evidence is not  
19          material under a Brady if it's sort of  
20          cumulative and weak impeachment evidence on an  
21          issue tangential to the conviction.

22          So the question is -- okay. Some of these  
23          documents could have been used to impeach  
24          Greg Naviloff. And this network scan, which,  
25          again, I addressed in the proffer and can

1 address further, could have been used to  
2 impeach. But is this the type of material  
3 impeachment evidence? And, again, sort of the  
4 standard for impeachment in the Brady context  
5 is there's a reasonable probability that the  
6 evidence would have changed the result.

7 So just regarding materiality, there are  
8 at least two reasons why this newly discovered  
9 evidence isn't material. And for the first  
10 reason, I really want to focus on the argument  
11 the Defendant put forth regarding materiality,  
12 which mostly came in through Jason Sgro and his  
13 testimony. And I think the basic takeaway from  
14 Jason Sgro's testimony is he disagrees with  
15 Greg Naviloff's invoice analysis, because the  
16 line items on the invoices, Mr. Sgro thinks,  
17 might contain additional work that Mr. Alrai  
18 and DigitalNet did that's not captured in the  
19 invoice.

20 And Mr. Sgro said "there's a lack of  
21 detail on these invoices. It would help to  
22 have more detail." And so that's why he wanted  
23 all of these emails from the IT help desk and  
24 Mr. Alrai's email. But what the Court hasn't  
25 seen, and what the Defendant hasn't presented,

1 is any of this newly discovered evidence that  
2 undercuts Greg Naviloff's assumption, which is  
3 that he can compare those line items directly  
4 to the invoices from other vendors.

5 And Greg Naviloff explained what he did  
6 is -- these are opaque invoices. There's not a  
7 lot of detail. And so he goes to the  
8 contracts, where there's more detail, and tries  
9 to match up the language in the contracts to  
10 the language on the invoices, and compare that  
11 to other contracts. So -- but this lack of  
12 detail in DigitalNet invoices is not a new  
13 issue. It came out at trial.

14 And I direct the Court to Dom Pallaria's  
15 testimony. Dom Pallaria was in the accounting  
16 department. And he testified that through his  
17 years of having Alrai at United Way, he was  
18 always troubled by, and often complained about,  
19 the lack of detail in DigitalNet invoices.  
20 Because United Way couldn't tell what they were  
21 paying for. This idea that the invoices are  
22 somewhat opaque was part of the fraud, in other  
23 words. And Mr. Pallaria even confronted  
24 Mr. Alrai about this with a particularly  
25 egregious example -- about a \$200,000 invoice

1 with very little detail.

2 And Mr. Alrai's response to  
3 Mr. Pallaria -- and this is from Dom Pallaria's  
4 trial testimony -- said, "Alrai said that  
5 we" -- United Way -- "is saving a lot of money  
6 by not requiring the vendor, DigitalNet, to  
7 provide a lot of extra detail and extra work to  
8 support their bill."

9 In other words, a key part of this fraud  
10 was ensuring that only Alrai had oversight into  
11 DigitalNet's bills, and only he could confirm  
12 that DigitalNet was providing what United Way  
13 was paying for. And this is why  
14 Greg Naviloff's second analysis is important --  
15 and Mr. Naviloff explained this at trial -- is  
16 that part of the reason for this second  
17 analysis was because there was a limitation to  
18 his contract and invoice-based analysis,  
19 because there could be other areas of value or  
20 expense to DigitalNet that aren't accounted for  
21 in those invoices. And so that's -- he  
22 explained the personal enrichment analysis  
23 tested the assumption that the other services  
24 and the invoices weren't performed at a loss or  
25 breakeven.



1           And, again, I point the Court to  
2           Jason Sgro's testimony during this hearing.  
3           Where, again, he's saying there's some  
4           additional engineering expense baked into these  
5           line items on the invoices that Naviloff  
6           analyzed. And that that additional cost would  
7           be reflected in the salaries for engineers.

8           Well, that cost to DigitalNet would have  
9           come through in Greg Naviloff's personal  
10          enrichment analysis, where he looked at  
11          DigitalNet bank records, he looked at Alrai's  
12          personal bank records, and tried to find all  
13          the costs to DigitalNet to providing services  
14          to United Way. And at the end of the day, he  
15          didn't find additional salaries for engineers.  
16          He didn't find additional cost to United Way  
17          that might explain what else those line items  
18          in the invoices provide. He found that  
19          Imran Alrai pocketed at least \$3.7 million  
20          through the fraud.

21          And there's another reason why the  
22          separate analysis renders this evidence  
23          immaterial. Because taken most charitably, the  
24          Defendant's materiality argument, again,  
25          through Sgro, is that we can't rely on this

1 invoice contract analysis because Ryan Gilpin  
2 didn't know enough about IT; therefore, you  
3 can't rely on any IT assumptions that underlay  
4 the comparison between the invoices and the  
5 contracts. And, so, therefore, you can't  
6 reasonably determine loss.

7 And Sgro admitted, "I'm not looking for  
8 perfection, but I'm looking for ways to  
9 reasonably determine loss." The way he would  
10 do it is by getting all of the emails from the  
11 help desk. And, again, the way Greg Naviloff  
12 did it was through this separate personal  
13 enrichment analysis. But the sentencing  
14 guidelines, and the application notice to  
15 Section 2(b)1.1, direct the Court what to do if  
16 it can't reasonably determine the loss due to  
17 fraud.

18 The guidelines direct "the Court shall use  
19 the Defendant's gain if loss can't reasonably  
20 be determined." So if, again, Jason Sgro and  
21 the Defendant are right that this evidence is  
22 so impeaching that the Court can't consider the  
23 line item analysis of the invoices, well, then  
24 the guidelines direct the Court to consider the  
25 Defendant's gain.

1           THE COURT: The guidelines don't counsel  
2 me to do that during the guilt phase of the  
3 trial.

4           MR. HUNTER: That goes to -- again, I  
5 think it's black letter law that for wire  
6 fraud, the Government doesn't have to prove  
7 that the victim suffered any harm due to the  
8 fraud. And there's plenty of cases about that.  
9 We cite some in our brief. I can cite more.

10          THE COURT: I know, but a jury could also  
11 find harm to the victim as part of wire fraud.  
12 It doesn't mean the jury -- the trier of fact  
13 can't.

14          MR. HUNTER: Yes, Your Honor, but the  
15 point for materiality is, is it material to  
16 guilt or innocence?

17          THE COURT: I know. Look, I understand.  
18 My question, though, is -- see, to me, loss  
19 calculation is very important. And it's  
20 inextricably connected to fraud because there's  
21 a causation element to fraud. I know it  
22 doesn't have to cause harm, but under a view of  
23 the evidence that it did cause harm -- and I  
24 think this case is a case that can be viewed  
25 that way. At least that's the way I viewed it

1       when I sat there and listened to it; right? I  
2       saw defrauding conduct -- very specific  
3       defrauding conduct that harmed the victim, no  
4       question. Economically -- you hit him in the  
5       pocketbook.

6               And I don't know how one finds loss and  
7       quantifies loss without connecting it with  
8       defrauding conduct; okay? To me, that makes it  
9       material. I know it could be done without that  
10      connection, without that causation, but that  
11      isn't that case to this Court -- at least the  
12      way I viewed the evidences the first time I sat  
13      through it.

14             And, frankly, I think the way that  
15      Mr. Naviloff did his business confirms that.  
16      Because he didn't just do math. He relied on  
17      IT expertise in areas involving things like  
18      overbilling and duplicate billing. He actually  
19      rolled up his sleeves and did the hard work and  
20      connected to the harm. I'm not sure you can --  
21      despite the fact that the law permits it,  
22      Mr. Hunter, I'm not sure you can separate harm  
23      to the victim from loss in a case like this,  
24      despite the fact that the law permits it.

25             Do you follow what I'm asking you here?

1 MR. HUNTER: I think so, Your Honor. And  
2 I guess I'd say a couple of things.

3 I think with regard to the IT questions in  
4 Greg Naviloff's analysis, it's limited to these  
5 four areas: Was there high availability  
6 backup? Which, again, John Meyer testified to  
7 it and was cross-examined about.

8 And then the other question is, is this --  
9 basically, is this a fair reading of the line  
10 item on the invoice?

11 THE COURT: Yeah.

12 MR. HUNTER: And so my materiality point  
13 is everyone knew going into this that the  
14 invoices were unclear, that they didn't have a  
15 lot of detail. And that one of the  
16 difficulties is how do you line these things  
17 up? And, again, Mr. Naviloff's primary way of  
18 doing that was looking at the language in the  
19 contracts. And he did have folks at his firm  
20 who would help him with vocabulary,  
21 understanding what this thing in the contract  
22 means, and so on.

23 But the lack of detail in the contracts  
24 was in no quantity going into trial. And  
25 that's where I think this personal enrichment

1 analysis goes to the materiality point the  
2 Court just raised. So I was raising it --  
3 there are kind of two reasons. One was the  
4 loss is not required to prove fraud, which the  
5 Court is pushing back on.

6 But the first reason was the second loss  
7 analysis -- the personal enrichment analysis  
8 was a way to check the IT assumptions, that  
9 there's not something else in this line item  
10 that DigitalNet's doing that DigitalNet's  
11 paying for that's not accounted for. So,  
12 again, I go back to Jason Sgro's testimony.

13 He's saying, "Well, the reason why these  
14 line items are so high is because you need  
15 engineers to do this. There are going to be  
16 other employees doing things." And, again, the  
17 Court saw the trial testimony. We know who the  
18 engineers were at DigitalNet. It was Cal Lobby  
19 (phonetic). And there are no other salaries --  
20 there's no other information in DigitalNet's  
21 financial records showing all this additional  
22 cost expense and value. So the second analysis  
23 basically allows -- Naviloff recognizing the  
24 limitations of this invoice analysis, because  
25 of the lack of clarity, to check if there's not

1           some unaccounted for bucket of value here.

2           And I guess the one other point I'll just  
3           raise regarding the Government's burden to  
4           prove loss is the Court also made a finding  
5           regarding United Way's intangible right to  
6           control its own assets. And I don't want to go  
7           down the whole rabbit hole of that, but we  
8           briefed it in our trial brief, and the Court  
9           has said it's done some additional research  
10          there.

11          And there, the Government alleged in the  
12          indictment that the fraud also defrauded United  
13          Way of their intangible right to control their  
14          own assets. And, again, the line of cases, I  
15          think, is fairly clear that what we're talking  
16          about is did the lie -- did the fraud that  
17          Imran perpetrated go to the core of the  
18          bargain? And here the Court presided over a  
19          ten-day bench trial, where it saw overwhelming  
20          evidence of Alrai's fraud and deceit, and the  
21          Court heard witness after witness -- the  
22          Defendant's old friends, employees for both  
23          victims, testified to this fraud.

24          The Defendant lying to United Way and  
25          Robert Allen Group about DigitalNet's

1 qualifications, how long it's existed, how many  
2 employees it has, its clients. I mean, in  
3 fact, one of the documents, and I think one of  
4 the more incriminating documents, was a  
5 document where United Way is trying to do their  
6 due diligence on this contract and confirm that  
7 DigitalNet is qualified. They ask for a list  
8 of clients. And we have the Word document on  
9 Mr. Alrai's computer showing him editing and  
10 creating this document, and then sending it  
11 back to United Way to do their due diligence.

12 So the Defendant's fraud regarding what  
13 DigitalNet is, what experience it has, goes to  
14 the core of the bargain, and falls right  
15 directly within these line of cases saying that  
16 the property that United Way can be defrauded  
17 of is their intangible right to control their  
18 own assets. So that was, again, charged in the  
19 indictment.

20 And I was looking through the transcript.  
21 The Court made a finding that there are two  
22 harms to United Way. One was its -- the  
23 overbilling, et cetera. And one was this  
24 intangible right or its ability to control its  
25 own assets.



1 THE COURT: You're saying I made that  
2 finding on the record?

3 MR. HUNTER: In the same sentence where  
4 you reference the overbilling/duplicate  
5 billing, you also mentioned United Way's right  
6 and ability to control their own assets.

7 THE COURT: Okay.

8 MR. HUNTER: So, again, the evidence of  
9 the Defendant's fraud through all of these  
10 other witnesses, including his deceit, was  
11 extensive. A lot of the most damning evidence  
12 was found on the Defendant's home computer,  
13 which the Court, again, heard testimony about.

14 So then that comes down to prejudice. And  
15 so what prejudice has the Defendant shown here?  
16 And, again, in essence, the issue was, was the  
17 Defendant able to effectively cross-examine  
18 Greg Naviloff about the assumptions in the IT  
19 invoice and contract analysis?

20 And as the Court has observed during his  
21 hearing, asking defense counsel, "What else  
22 would you do if I reopened the trial and  
23 reheard evidence?" Defense counsel  
24 cross-examined Mr. Naviloff extensively with  
25 this new evidence.

1           And so we're talking about cross-examining  
2           Greg Naviloff about these assumptions. That's  
3           what the Defendant could have done. The  
4           Defendant has not done that -- or could do that  
5           under Rule 33. But it's all not prejudicial  
6           for the same reason it's not material; and that  
7           is that even if these assumptions are  
8           impeached, first, the Government would submit  
9           they're not so impeached so as to completely  
10          undercut the validity of Mr. Naviloff's loss  
11          analysis. I think his analysis is still sound  
12          and still stands.

13          But, also, there's a second analysis that  
14          recognizes the limitations of the initial one  
15          and confirms it. So it's not prejudicial for  
16          those reasons, and because the Defendant has  
17          effectively had a second bite at the apple, so  
18          to speak. He's been able to cross-examine  
19          these witness. He's been able to cross-examine  
20          John Commisso.

21          And, again, the Defendant has not pointed  
22          to a single document that contradicts the  
23          assumption -- the IT assumptions that underlay  
24          Greg Naviloff's loss analysis. What it boiled  
25          down to, I think -- what I saw on the slides

1       that defense counsel just presented -- was it  
2       was impeaching because they could cross-examine  
3       Greg Naviloff about the work that Ryan Gilpin  
4       did. But I haven't seen an argument that  
5       there's something materially wrong with those  
6       assumptions with the invoices. So for those  
7       reasons, the Government -- the Defendant failed  
8       to meet his burden under Brady.

9       And, again, I would just point the Court  
10      to Rule 33. At the end of the day, if there's  
11      anything more that defense counsel needs to do  
12      with this newly discovered evidence, the Court  
13      has the ability to reopen evidence,  
14      essentially. And in the context of Rule 33,  
15      that's after a judgment's been entered, which  
16      hasn't even happened here yet.

17      So the Court's the finder of fact.  
18      Defendant counsel has all of these emails --

19      THE COURT: I was wondering about that. I  
20      read the rule myself.

21      Are you telling me I can't order this  
22      relief until I order a judgment first?

23      MR. HUNTER: I don't know the answer to  
24      that either. There's not a lot of cases on  
25      this. As a practice --

1           THE COURT: I doubt it. I doubt that I  
2 have to -- I did render guilty verdicts; right?

3           MR. HUNTER: Right. And as a matter of  
4 common sense and practicality, I agree.

5           What difference does it make, you know,  
6 other than add more paperwork for the clerk's  
7 office?

8           THE COURT: Okay.

9           MR. HUNTER: So, again, the point here is  
10 the Defendant either already has or the Court  
11 could allow the Defendant to use this evidence  
12 to cross-examine whatever Government witnesses  
13 the Defendant wants to cross-examine. And so  
14 for that reason, there also cannot be prejudice  
15 sufficient to warrant a dismissal of the  
16 indictment.

17          THE COURT: I think I'm with you there --  
18 I really do. I understand the Defendant has  
19 lodged some serious allegations here, and is  
20 very adamant, but I just don't view dismissal  
21 here as a remotely likely outcome in this case.  
22 I don't view the prosecutor's conduct as  
23 intentional or egregious in a way that would  
24 necessitate or warrant dismissal.

25          Let me ask you a question then,

1 Attorney Brown. Have you thought about -- if I  
2 decide to order this relief, right, would you  
3 want a jury trial? Or would you just want  
4 rehearing on certain evidence? What are you  
5 thinking?

6 MS. BROWN: We've actually discussed that.  
7 And, you know, not to get into a lot of detail,  
8 but I think that the Defendant would certainly  
9 have a right to reconsider waiving jury trial.  
10 And I think -- and I talked about that last  
11 week, and I can include that in the  
12 supplemental briefing. I found a brief from  
13 another attorney addressing this issue.

14 But that's one of the arguments that that  
15 other attorney made -- is that now that his  
16 client has more impeachment ammunition, maybe  
17 they don't -- the reasons a client might want  
18 to waive a jury trial. And then if they've got  
19 more ammunition in the case and maybe a  
20 different theory that goes after the  
21 Government's investigation, then maybe they may  
22 not want to waive.

23 So we may want a jury trial. That was my  
24 long answer, sorry, on that.

25 THE COURT: You're telling me that you

1 don't know yet, but you want it on the table?

2 MS. BROWN: We want it on the table. And  
3 we will -- like I said, I didn't want to take  
4 all day in my closing arguments. I'll address  
5 that issue. I've got a couple of cases on it.  
6 And I'll put a paragraph or two in the  
7 supplemental pleading to the Court.

8 THE COURT: Yeah.

9 I'm not sure how much I -- last week when  
10 I was listening to your arguments, I thought I  
11 might need more briefing on the merits. I'm  
12 less sure about that now. I thought that I  
13 would -- if you wanted to do it, I would  
14 certainly accept it, but I'm not sure I'm going  
15 to order it anymore.

16 But I definitely am going to order -- ask  
17 you to brief for remedy.

18 MS. BROWN: Okay. Yeah, as long as I  
19 get -- because I didn't address that in my  
20 presentation. So if I can do that and submit  
21 the PowerPoint.

22 THE COURT: Mr. Hunter, I want to let you  
23 finish your argument, but I also don't want to  
24 cut you off.

25 MR. HUNTER: I think I'm just about done,

1 Your Honor.

2 Basically, the conclusion is the Defendant  
3 hasn't shown egregious prosecutorial  
4 misconduct, hasn't shown that the Government  
5 suppressed any evidence, and hasn't shown that  
6 the newly discovered evidence is material or  
7 has failed to show prejudice. So each of these  
8 is independently fatal to the motions.

9 THE COURT: Right.

10 No egregious conduct warranting dismissal.  
11 No suppression. No materiality. No prejudice.  
12 Right.

13 This is a question of fact: Who can speak  
14 to the retention -- the actual facts around the  
15 retention of Naviloff?

16 Is it you, Mr. Hunter? Or is there  
17 somebody else who made that happen?

18 MR. HUNTER: That would probably be  
19 Mr. Davis.

20 THE COURT: Do you remember, Mr. Davis,  
21 how it was that you decided to retain and then  
22 retained Mr. Naviloff -- how that came about?

23 MR. DAVIS: Judge, it always struck me  
24 that there were no conflicts -- at least  
25 relevant conflicts -- between United Way and

1 the Government's position on the question of  
2 calculating loss. And once I saw that United  
3 Way had retained Mr. Naviloff and the nature of  
4 the work he had done and was doing, and also  
5 his qualifications, it struck me at some point  
6 that it would be efficient to simply build on  
7 that work.

8 And so at some point, I began to go  
9 through the contract process. Of course, we  
10 have to go through a process -- we have a  
11 contracting officer.

12 THE COURT: Yes.

13 MR. DAVIS: We had to separately negotiate  
14 a raid, and so on. But I don't know if that  
15 gets to the Court's point, but it just -- I try  
16 to be efficient in spending the Government's  
17 money and in getting to what we need to get to.  
18 And I certainly think it was my idea, and not  
19 someone else's, to retain Naviloff as a  
20 Government expert.

21 THE COURT: I've been wondering about that  
22 with my law clerks throughout the litigation.  
23 Because it seems like it makes sense. From an  
24 efficiency standpoint, it makes a lot of sense.  
25 Looking back now, it probably feels like it



1 made things complicated, but I can certainly  
2 see the impulse to do it at the time. So  
3 you've told me why, and it makes perfect sense  
4 to me.

5 Can you tell me how? In other words, I  
6 don't mean the contracting officer, but did you  
7 discuss it with representatives of the United  
8 Way, including, but not limited to,  
9 Mr. Commisso?

10 MR. DAVIS: So I'm sure I discussed it  
11 with Mr. Commisso, and I'm pretty sure I didn't  
12 discuss it with anyone else. That is, I  
13 regarded United Way as a represented victim,  
14 and I would not have called the CEO or did  
15 something separate. But I know that I talked  
16 with him about it. And, frankly, if he had  
17 objected, of course, we wouldn't have done  
18 that.

19 I think there wasn't an objection and,  
20 perhaps, he shared my general views. And the  
21 Court's comment about the complications that  
22 have ensued -- maybe I would have done it  
23 differently. I'm not going to deny that,  
24 Judge.

25 THE COURT: Oh. Okay. Thanks.

1           Mr. Hunter -- I'm going to pose the  
2           questions to Mr. Hunter, since he made the  
3           argument -- but, Mr. Hunter, any time you want  
4           to delegate one of your cocounsel to answer the  
5           question, feel free; okay?

6           MR. HUNTER: Okay.

7           THE COURT: What about the bill? What  
8           about the bill? Because, understand, from the  
9           Court's perspective, that's exculpatory. Just  
10          showing that -- and not necessarily in a way  
11          that goes to concealing, or inconsistency, or  
12          anything. But it's exculpatory in the sense  
13          that the expert isn't responsible for all the  
14          work. And that's just exculpatory in the  
15          normal courts.

16          What about your obligation to produce  
17          that? That one didn't get produced and it was  
18          in your possession -- unlike everything else  
19          that, I concur, it's not a suppression of  
20          evidence case at all.

21          But what about the bill? What about your  
22          obligation to produce that? I know the Rule 16  
23          doesn't specify it, but it's very, very -- it's  
24          so customary that I was almost surprised it  
25          wasn't produced.

1           What do you say about that?

2           MR. HUNTER: So I'll say, at least -- I'll  
3 let Mr. Davis talk about the bill as it came  
4 in, just because I don't know about that.

5           But I will say this regarding the  
6 materiality exculpatory point: I would just  
7 direct the Court -- on paragraph ten of  
8 Mr. Naviloff's report, he discloses that he  
9 received assistance from professional staff at  
10 RSM working under his supervision, and it  
11 disclosed their billable rate.

12           So at least regarding the fact that people  
13 worked -- there were multiple people on the  
14 team, and how much RSM was getting paid -- when  
15 I was thinking of expert discovery, I was  
16 seeing that has been disclosed. I'll be  
17 honest -- I didn't think about the bill,  
18 personally.

19           THE COURT: Okay. That's a straight  
20 answer. So what were you just pointing me to?

21           MR. HUNTER: Greg Naviloff's expert report  
22 that was produced, obviously, pretrial. And  
23 paragraph ten talks a bit about that.

24           THE COURT: Could you read that to me?  
25 Please read slowly for the court reporter.

1           MR. HUNTER: Will do, You Honor. And we  
2           filed this as an exhibit, docket No. 170-1.

3           On page seven of the PDF, paragraph ten of  
4           the report, he says, "I received assistance  
5           from professional staff at RSM working under my  
6           direct supervision. Throughout this report, I  
7           make reference to procedures performed.  
8           There's procedures that in some instances may  
9           have been performed by staff under my  
10          supervision. RSM is being compensated at a  
11          blended rate of \$350 per hour and \$580 per hour  
12          for court testimony."

13          THE COURT: So at least -- at the very  
14          least, actually -- at least the fact of  
15          compensation and the rate of compensation were  
16          disclosed. Okay. That's not insignificant,  
17          actually. Because that's sort of basic cross;  
18          right? You go through that. I don't remember  
19          if Harrington did, but you go through that.  
20          All right. Well, that's something. Thank you.

21          But I remain, though -- even with that, I  
22          remain convinced that the varying amounts of  
23          time, both relative to Naviloff himself and to  
24          each other, have at least the potential for  
25          exculpatory use -- impeachment use. Given

1           that -- I mean, you said you didn't think about  
2           it, so I guess it's -- there might not be much  
3           you can say about it.

4           But don't you recognize that that's  
5           impeachment material, and, therefore,  
6           exculpatory material that was in your  
7           possession?

8           MR. HUNTER: I mean, I guess so, broadly,  
9           yes. It's impeaching. And so the question is,  
10          is it materially impeaching? Does it go -- is  
11          there a reasonable probability that that would  
12          have changed the result of the trial is, I  
13          guess, the question?

14          THE COURT: In isolation, I guess not.  
15          Fair. That's a straight answer. Okay. Let me  
16          see what else I want to -- I have a few  
17          questions for you -- that, again, you can  
18          either answer or bounce.

19          In your objection of the motion to  
20          dismiss, you make the point that Commisso and  
21          United Way had diverging interests from the  
22          Government. But Mr. Davis just made the point  
23          that they weren't in conflict. I think they  
24          were divergent, but not in conflict.

25          But the objection says, quote, "including

1 privilege, protecting United Way's public image  
2 and donor relationships, and protecting United  
3 Way from tax, regulatory, and other fallout due  
4 to Alrai's actions," end quote. And those were  
5 examples of divergencies; right -- divergences,  
6 I guess, in the interest?

7 I guess I want to know your opinion -- and  
8 I want to say this with all due respect to  
9 Mr. Commisso for having handled it. Should  
10 there had been more distance between  
11 Mr. Commisso and this prosecution effort? Or  
12 are you comfortable with how this played out?

13 And if that's something you want to  
14 bounce, I don't mind, because I know you  
15 haven't probably seen a ton of this over the  
16 years. But this is -- it's not unusual, and I  
17 wouldn't call our case for the victim to have  
18 counsel. But this was a lot of involvement.

19 This is just my observation: This was a  
20 lot of involvement. And there clearly was  
21 economic motives here for the victim to  
22 increase the loss. That's just part of it. I  
23 mean, that stands to -- depending on how an  
24 insurance carrier views it, and maybe  
25 eventually at tribunal, that has impact on the

1 amount of a recovery. And not in a criminal  
2 remedy -- in a different remedy. I view this  
3 as very close.

4 Do you have any thoughts about that?

5 MR. HUNTER: Yeah, I guess I'll say one  
6 thing. And, again, I'll defer to John Davis  
7 regarding comfort based on his probably having  
8 much more experience on this than me.

9 Certainly, my thinking and approach at the  
10 time regarding Mr. Commisso's involvement  
11 was -- it partially flowed from the fact that  
12 we retained RSM, and RSM did work that -- like  
13 the data breach investigation that was still  
14 privileged. And, therefore, Mr. Commisso  
15 needed to remain involved to ensure that United  
16 Way's privilege was asserted.

17 And so I was not uncomfortable with it for  
18 that reason, but I'll defer to Mr. Davis.

19 THE COURT: Only if you have thoughts,  
20 Mr. Davis.

21 MR. DAVIS: I will just say, Judge, that  
22 part of my judgment in this case was informed  
23 by Mr. Commisso's obvious ability and his  
24 obvious strong moral compass and  
25 professionalism. And I'm not going to get into

1 making tributes, but I would just say it was  
2 very, very reassuring in the difficult early  
3 days of this whole situation to find that the  
4 guy on the other end of the phone is this  
5 thorough and calm, levelheaded, and always,  
6 always truthful, as far as I could tell.

7 I never had a sense that the Government  
8 was getting played, that there was BS, that --  
9 any of that. And so I certainly agree that the  
10 Government relied to a great extent on  
11 Mr. Commisso in this case. But I would just  
12 say part of that is never in the  
13 relationship -- and I would say that to this  
14 day -- did I see things that gave me pause  
15 about the accuracy, or about the credibility,  
16 or about the motives of what's going on at the  
17 other end.

18 And I would also say that -- is there  
19 bias? Is there a motive to maximize  
20 restitution? Of course. He's a victim. He's  
21 representing a victim. And I know it's a  
22 corporate victim and not a personal victim, but  
23 that's what we do as prosecutors, as the Court  
24 knows. We work with victims. And they have  
25 statutory rights. They have the right to



1 confer. They have the right to respect of  
2 their dignity and privacy. They have a right  
3 to notifications of all kinds of things. They  
4 have the right to appear.

5 And there should be no surprise -- or at  
6 least there's no surprise on my part -- that  
7 Mr. Commisso, representing United Way, is  
8 seeking the best result for his client, which  
9 has been horribly violated here. And so the  
10 Court says it's unusual. I agree it's unusual.  
11 This is a greater extent of involvement with  
12 the Government than most cases.

13 But, again, as an officer of the court, I  
14 will just say nothing that Mr. Commisso ever  
15 did gave me pause about his credibility and his  
16 professionalism. And so when it came time to  
17 hiring an expert, I hired the same expert he  
18 did. And maybe that was a mistake, but it  
19 wasn't a bad faith mistake.

20 THE COURT: No.

21 MR. DAVIS: And I stand by the discovery  
22 we provided in this case, both before trial and  
23 after.

24 I guess the last thing I'll say is I wish  
25 I had produced the bill. And I see the bill is

1 addressed to me. I'd assume I received it.  
2 I've actually just looked in my inbox, and I  
3 can't find where I got the email. But my guess  
4 is, Your Honor -- I think the one bill is dated  
5 October 19. I assume we would have gotten it  
6 around early November. I am sure that I  
7 forwarded it to contracting.

8 And I wish and I kind of assume I would  
9 have said, "We need to disclose that," and  
10 would have sent that to the paralegal, but I  
11 apparently didn't.

12 THE COURT: Yeah.

13 MR. DAVIS: And the only failure on that  
14 score by the prosecution team is mine. I would  
15 have been the only person, I think, to actually  
16 see the bill.

17 And I think that one bill before trial may  
18 have been the first bill -- I didn't think of  
19 it -- I certainly don't remember reading it. I  
20 probably wouldn't have even read it, other than  
21 to note the total. And I would certainly say  
22 that the significance that there were multiple  
23 parties working on the case under Naviloff  
24 would have entirely escaped me; that is, I  
25 would expect that RSM would have associates.

1 And RSM, of course, just in October had  
2 produced a huge report with a huge number of  
3 schedules. It was a big production job.

4 And so -- wouldn't have struck me as odd  
5 that Greg Naviloff, senior partner, is not the  
6 only person on this bill. I was in private  
7 practice. I assume --

8 THE COURT: Oh, yeah.

9 MR. DAVIS: And there are a whole lot of  
10 engagements that are like that. So I'm not  
11 going to beat myself up too much, because I  
12 don't think it would have struck me until now  
13 that we're in the questions about IT expertise,  
14 and who do you rely on, and was it Rosenfeld,  
15 and so on.

16 Anyway -- but the shortcoming there is I  
17 probably just sent that bill to contracting to  
18 pay, and completely missed its significance as  
19 something that should have been disclosed.

20 MS. BROWN: Your Honor, can I add  
21 something here?

22 THE COURT: Not yet. I promise I'll give  
23 you a chance, but I can't lose my train of  
24 thought. Let me just make a note, then you can  
25 say what you want to say, instead of losing my

1 train of thought that way.

2 MS. BROWN: Well, just briefly, I want  
3 to --

4 THE COURT: Hold on a second. Let me make  
5 a note. I want to not lose my train of  
6 thought. Sorry.

7 Go ahead, Attorney Brown.

8 MS. BROWN: I apologize for interrupting,  
9 but I didn't want you to consider what  
10 Attorney Davis just said.

11 He's not under oath. He's not a witness  
12 in this case. He just vouched for a witness.  
13 He went on about the moral compass of this  
14 witness. It's one thing to summarize or make a  
15 proffer to the Court about discovery and how he  
16 got it, but it's another thing for a  
17 non-witness lawyer in the case to vouch for the  
18 moral compass, and also to give factual  
19 testimony about the exhibits in this case and  
20 whether he remembers reading them or didn't  
21 read them. That -- we don't have a way to  
22 cross-examine on that.

23 And I'm not saying that, again, to say  
24 that he's lying about that. You said it  
25 yourself earlier, that we all have a way of

1 remembering things in a way that supports our  
2 beliefs, and our biases, and our opinions.

3 I think there's actually a saying out  
4 there that "the faintest ink is better than the  
5 best memory." And that's because we all  
6 remember things in a way that support what we  
7 want to believe we did. I'm included. I'm not  
8 saying that he did that.

9 But I think that to have him vouch for the  
10 moral compass of the witness -- I think that's  
11 inappropriate. And I don't even know that the  
12 Court expected that answer -- for him to go on  
13 as long as that. But I would ask that, to the  
14 extent it's testimony, that it be stricken and  
15 not be part of the record or the Court consider  
16 it in making the fact findings in this case.

17 THE COURT: Sure. Okay. For what it's  
18 worth on both issues -- let me just take them  
19 one at a time.

20 Regarding vouching for Mr. Commisso --  
21 yeah, I don't know anything about  
22 Mr. Commisso's moral compass. But I will say  
23 that nothing I've heard in this proceeding  
24 makes me question his ethics or his honesty.  
25 And like I said, he conducted himself as I

1 would expect counsel for a victim to do in  
2 terms of its propriety, in terms of its ethics,  
3 in terms of its lawfulness. Okay.

4 As to the exhibit, though, I mean, I did  
5 -- I have been saying I didn't plan to put the  
6 prosecutors under oath, and I was going to ask  
7 them some questions. So I did plan to at least  
8 rely on what Mr. Davis said about the bill.

9 And, so, I mean, if you want to  
10 cross-examine him about that, I'll put him  
11 under oath and have him repeat it. Because it  
12 matters to me. That matters. It's not -- you  
13 didn't call any of these people as witnesses,  
14 but there's more to the story here than  
15 Commisso's conduct.

16 When you're accusing prosecutors of  
17 intentionally suppressing evidence here --  
18 which you've done, and as is your right to  
19 do -- it's not unusual to call the prosecutors  
20 as witnesses and ask them to account for it.  
21 Now, I'm willing to accept their words about  
22 the facts the same way I'm willing to accept  
23 your words, but that doesn't mean you have to  
24 accept it, Ms. Brown.

25 So if you'd like me to do that, I will do

1           that. But I did plan on relying on what  
2           Mr. Hunter said, and what Mr. Davis said about  
3           the bill. I'm talking about the bill -- not  
4           about their opinion about Mr. Commisso.

5           So if that's something you'd like to cross  
6           him on, or you want to test, I think we  
7           probably should go through the formality.  
8           Because to me, it matters. And it matters  
9           only -- honestly, it only matters on the issue  
10          of intentional suppression and outrageous  
11          conduct. Based on what I've heard, I'm not  
12          prepared to go there, but you might not be  
13          willing to accept that. And I mean this -- I'm  
14          not trying to just talk you out of it. If you  
15          want to examine him on this, it's up to you.

16          MS. BROWN: Well, he was not noticed as a  
17          witness for this hearing, so I'm not prepared  
18          to. But more importantly, if he is going to be  
19          a witness and the Court's going to accept his  
20          representations, then I want to see the emails  
21          on this case.

22          That's the point I've made all along --  
23          they haven't produced any emails. If they were  
24          instructing RSM to give all of their analysis,  
25          or instructing them to give exculpatory Brady

1 material, there's no evidence that they've done  
2 that. And if I were going to cross-examine  
3 him, which I'm not prepared to do because he's  
4 not noticed as a witness for this hearing -- if  
5 I were going to cross-examine him, I would want  
6 the Court to order production of any emails  
7 that he had regarding this -- regarding  
8 instructions to their expert and discussions  
9 with their expert.

10 Did they send an email saying, "Hey, we've  
11 represented in a hearing that we've given the  
12 Court everything you've reviewed and any  
13 analysis, any documents you've reviewed. Is  
14 that true?" Those are things I would  
15 cross-examine him on. And that's important.

16 So I don't think the Court can take out  
17 this part, of, "Oh, I don't even know that I  
18 paid attention to it" as not a big deal. I  
19 would cross-examine him about things that I  
20 don't have. Which -- and we haven't gone there  
21 yet, which is there are cases out there of  
22 getting emails from prosecutors, if there's an  
23 issue -- of whether those emails are relevant.  
24 And we haven't gone there, but if the  
25 prosecutor's going to testify and --



1 THE COURT: Respectfully, it's your burden  
2 here.

3 I mean, you just said, "We haven't gone  
4 there yet." Okay. But one thing I don't want  
5 to do is decide this motion and then have you  
6 say you were somehow prejudiced, and your  
7 client's rights were violated, in the way I  
8 conducted this hearing. I mean, this has to  
9 end at some point.

10 MS. BROWN: Absolutely. If the Government  
11 had noticed Attorney Davis as a witness for  
12 this hearing, I would have asked for additional  
13 documents.

14 THE COURT: No, no, no. You should have  
15 noticed him for the hearing. It's your burden.

16 Don't you think that their conduct --  
17 you've alleged their conduct as misconduct.  
18 You've alleged that they've intentionally  
19 suppressed evidence. And it's fair enough, but  
20 I don't think it's up to them to notice him.  
21 They could, but I don't think it's sort of a  
22 shortcoming on their part not having done it.

23 And I guess maybe I shouldn't have said  
24 I'm willing to listen to them without swearing  
25 them in. I try to treat officers of the court

1 a little differently than I treat fact  
2 witnesses. Frankly, if anybody wanted  
3 Mr. Commisso to speak to me just as he had, I  
4 would have done it as long as everybody agreed.  
5 I really don't want to do yet a hearing about  
6 how we did this hearing, okay, after its all  
7 over.

8 I have a few more questions, but we might  
9 be having another day of hearing, because  
10 apparently, if I accept Mr. Davis' and  
11 Mr. Hunter's representations, that's going to  
12 be a problem. And that's fine. Let me see if  
13 I have more questions about the law I want to  
14 ask.

15 Well, I have to ask -- I don't know who  
16 I'm asking. This is just a legal question.  
17 But, like, Mr. Hunter -- you said to the Court  
18 earlier that you had been instructing, I guess,  
19 Naviloff and Commisso that you wanted their  
20 analysis.

21 So I'm not sure who gets this question;  
22 okay. Because Mr. Davis just told me that he  
23 certainly was aware and would assume that  
24 Mr. Naviloff would be working with staff;  
25 right? He's working with staff that aren't

1 accountants. He's working with staff that are  
2 IT professionals.

3 And you had a bill in your possession that  
4 showed their names, and how many of them there  
5 were, and even their relative amount of work.  
6 I just can't imagine how one would not assume  
7 that their communications internally included  
8 analysis.

9 What did it include then? I assume when  
10 these gentlemen on the bill communicated --  
11 we've seen a little bit of it -- with  
12 Mr. Naviloff, they explain themselves about the  
13 conclusions they reach and how they reach them.

14 How is that analysis not relied upon by  
15 Naviloff? Again, I've told you this so many  
16 times -- that's where I'm struggling with this.  
17 I'm not seeing intentional conduct to bury  
18 exculpatory evidence. I'm just seeing,  
19 perhaps, a failure to appreciate an obligation  
20 that goes beyond Rule 16 and beyond any order I  
21 issued.

22 It just goes to -- if you understood -- if  
23 you assume, whether you assumed that he'd be  
24 working with staff or you had a bill that  
25 showed you he'd be working with staff and named

1       them, I can't imagine how that doesn't trigger  
2       in your mind either an obligation to produce  
3       that stuff or at least examine it for  
4       exculpatory evidence that must be produced.

5       So what's the answer to that question,  
6       Mr. Hunter? Because you've told me you talked  
7       about analysis to them. That was you today.  
8       Ms. Brown doesn't want me to rely on it? Well,  
9       I'm relying on it; okay. Mr. Davis has  
10      explained to me that he assumed it. He had a  
11      bill.

12      How is that not analysis? How did you not  
13      -- if you don't think you had the obligation to  
14      produce it -- and maybe you thought that  
15      because Harrington wasn't demanding it with a  
16      line item. I get that much. But what about  
17      the obligation to at least examine it to see if  
18      there was something there that was exculpatory  
19      that should be produced? We can't just take  
20      expert witnesses as deciding what to produce  
21      for themselves.

22      What's the answer?

23      MR. HUNTER: And so, I'm sorry, Your  
24      Honor. You cut out a little bit.

25      But -- so I certainly -- I don't recall

1 the exact conversation with Greg Naviloff, but  
2 I know one of the things that Mr. Harrington  
3 requested was all the reports prepared by  
4 people at RSM, including employees working  
5 under Greg Naviloff. And that was sometime --  
6 and, again, I don't have a precise recollection  
7 of that conversation.

8 THE COURT: Time out.

9 We've just established -- you just spent a  
10 long time establishing that your memory of what  
11 happened is not really fair material for this  
12 hearing. I'm not asking you about that.

13 I'm telling you what I'm assuming, since  
14 you've already told me that you were looking  
15 for analysis. And since I know now that you  
16 had this bill with all their names on it, and  
17 Mr. Davis, as the lead prosecutor, also would  
18 just assume, even had he not received a bill,  
19 that he was communicating with staff -- that  
20 staff was not accountants. It was people  
21 outside of Naviloff's expertise.

22 So if you don't -- I want to know, one,  
23 why you don't think you have the obligation to  
24 produce that analysis. And I view it as  
25 analysis. Or, B, why you didn't have the

1 minimal obligation to review it for exculpatory  
2 evidence? Because the discussion regarding the  
3 low-level associates certainly would have been  
4 producible. And that was brought to light  
5 during trial when Naviloff downplayed it,  
6 because he did -- or at least a trier of fact  
7 could assume that he did.

8 So didn't you have an obligation to do  
9 that, as an attorney who has a constitutional  
10 obligation to produce exculpatory evidence?

11 MR. HUNTER: Judge, just so I understand  
12 the first question.

13 Are you asking -- do we have a  
14 constitutional obligation to collect RSM's  
15 internal emails to review them for exculpatory  
16 evidence?

17 THE COURT: Well, you can reject my  
18 definitions, but I'm saying, do you have an  
19 obligation to produce analysis since you told  
20 me you directed them to produce their analysis?  
21 And I think communications with underlings  
22 outside of one's area of expertise to form  
23 one's opinions are analysis.

24 And I think -- and so my question is,  
25 didn't you have an obligation to either produce

1           that or at least examine it for exculpatory  
2           evidence?

3           MR. HUNTER: And I guess I would say if we  
4           knew that there was some bucket of exculpatory  
5           evidence or potentially exculpatory evidence.  
6           But I haven't -- I think that there may well be  
7           an obligation to review that for Brady. But I  
8           think here, there's no evidence -- and I  
9           certainly don't have a memory of any  
10          conversation about -- well, I don't want to get  
11          into that -- but of some knowledge of  
12          undisclosed reports or analysis of RSM  
13          underlings.

14          And so is there an obligation for the  
15          Government to collect every bit of internal  
16          communication or work product of one of their  
17          experts? I haven't been able to find a case or  
18          any legal authority for the Government having  
19          such an obligation under the rules of evidence  
20          or Brady.

21          THE COURT: Well, there's a lot of -- this  
22          line of cases -- a criminal case, Bullcoming  
23          and the First Circuit case. Let me see.

24          The First Circuit case, Ramos-Gonzalez,  
25          664-F-31 -- it's not a discovery case. It's

1 not a Brady case. But it's a 6th Amendment  
2 confrontation case. And it at least suggests  
3 that underlings that the lead testifying expert  
4 relied on in forming his opinion -- that a  
5 defendant has a right to actually confront them  
6 and cross-examine them.

7 I know it doesn't translate perfectly to  
8 this, and it doesn't. But that's what I'm  
9 asking you. I mean, look, I know there's not a  
10 case that says you have to look at every  
11 internal document. I know. That's why I've  
12 repeated a hundred times in this hearing --  
13 this wasn't a discovery rule or order  
14 violation.

15 But you've told me today that you were  
16 looking for analysis; okay -- analysis relied  
17 upon by the expert. And I'm asking you, right,  
18 given that Mr. Davis just told me -- well, I  
19 knew he already had the bill. You had the  
20 bill. It was in your possession. The team had  
21 the bill. And that the lead prosecutor assumed  
22 that he would communicate with his staff. And  
23 these were staff that were not accountants.  
24 They were IT experts.

25 So I'm asking you -- yeah. If you think



1 the answer is no, you can tell me, or yes and  
2 why. But why was there no obligation to either  
3 produce it as analysis or review it for  
4 potential exculpatory evidence? When people  
5 communicate with each other, that's  
6 bread-and-butter evidence. There's statements  
7 of witnesses. That's what witnesses are  
8 cross-examined with. That's how this works.  
9 We all know how it works in court.

10 Wasn't there an obligation to either  
11 produce it or review it for exculpatory  
12 evidence?

13 MR. HUNTER: I don't think so, Your Honor,  
14 unless we had some reason to believe that that  
15 evidence existed. I think we had a duty to --  
16 we inquired to get evidence, especially in  
17 response to Defense's discovery request, but I  
18 don't think we had -- I don't think the  
19 Government had an affirmative obligation to  
20 look at all of the internal communications of  
21 RSM and review all of them. I think -- I just  
22 don't think we did.

23 THE COURT: Okay.

24 Let me ask you this, Ms. Brown. Rosenfeld  
25 billed one hour. But a review of the records

1 looks like he worked more than one hour on  
2 this.

3 Would you concede it looks more like he  
4 worked about five hours?

5 MS. BROWN: There were times -- he worked  
6 more than one hour. I would agree with that.  
7 And I think part of it might have been during  
8 the RSM kind of tenure of -- during RSM's  
9 tenure of working with United Way.

10 THE COURT: Looks like Exhibit 30 on your  
11 motion, Attorney Brown. It's 164-30: Another  
12 four hours. I'm not saying it's still not  
13 fodder for cross. It is fodder for cross, but  
14 it's not one hour. That's all I'm asking. All  
15 right.

16 So, Mr. Hunter, this kind of goes back to  
17 what we were just talking about. I view the  
18 Government as having backed away from one of  
19 its positions in the brief, but I don't want to  
20 put words in your mouth. So if you don't agree  
21 with this, I want you to tell me; okay?

22 In the objection -- your objection to the  
23 motion to dismiss, you said the itemized bills  
24 don't have impeachment value. Now, I think  
25 they do have impeachment value; okay? They

1 list out the time billed by each member of the  
2 forensic team, right, and the technology  
3 specialist separately.

4 I think they're relevant to the Defense  
5 because they're an impeachment of Naviloff,  
6 both in general -- the amount of work Naviloff  
7 did, the amount of work others did -- and then  
8 especially with respect to the fact that  
9 Naviloff, at trial, kind of emphasized one who  
10 did very little and didn't mention the others.  
11 And there was material discussing the person  
12 who did the most as being very junior; right?

13 Do you agree with me that there's some  
14 impeachment value there?

15 MR. HUNTER: So, I think, so, Your Honor,  
16 which is what I said earlier in the hearing.

17 THE COURT: I thought you did. Okay.

18 MR. HUNTER: And I think -- to what I said  
19 -- and I think -- not to completely back away  
20 from the argument in the brief, but I think it  
21 goes to the materiality prong, given what was  
22 disclosed in the expert report, which was that  
23 he was consulting with other people at his  
24 firm, including other IT professionals at his  
25 firm, and the billable right.

1           But I agree, Your Honor, that it is  
2           impeachable.

3           THE COURT: Last question from me, then.

4           On the Rule 17 issue, right -- the "they  
5           should have subpoenaed" issue -- which, by the  
6           way, I think is a fair argument. There could  
7           have been subpoenas issued in this case that  
8           weren't -- to the victim. All right? I think  
9           Mr. Commisso would have been in there objecting  
10          and moving to quash, I understand, but I think  
11          we would have figured something out.

12          But Attorney Brown is saying that they  
13          relied on these representations that it had  
14          been given, quote, "every document Mr. Naviloff  
15          considered when he developed his opinion," and  
16          that, quote, "there were no notes or memos  
17          memorializing RSM's interviews with United Way  
18          personnel."

19          I don't know if you wrote that in the  
20          pleading, but if you did, what was the basis  
21          for that assertion? Because it doesn't appear  
22          that would have been true. What was the basis  
23          for that assertion at the time? What were you  
24          relying on?

25          MR. HUNTER: So starting with the notes of

1 interviews -- we were relying on Mr. Naviloff  
2 and RSM. And I think a similar representation  
3 is in Exhibit 21, because I think  
4 Mr. Harrington asked about it. And this is the  
5 email from Greg Naviloff to us responding to  
6 that. And, actually, that's true of both parts  
7 of the Court's question.

8 THE COURT: Okay. Every document and then  
9 every interview.

10 Now, you'd agree with me, though, that the  
11 Defense was entitled to rely on those  
12 assertions in determining whether it should  
13 issue subpoenas; right? Or no?

14 MR. HUNTER: I mean, I think so. And part  
15 of my -- and this, I think, goes to part of the  
16 pretrial litigation we had over the -- even the  
17 litigation database; right? There was always a  
18 set of documents that the Defense requested at  
19 one point that he didn't get.

20 And those are the documents -- and I think  
21 this is -- again, it goes to the materiality  
22 point. It's those documents that Mr. Sgro says  
23 would be most material; right -- all of these  
24 documents from -- the emails to the IT help  
25 desk, and so on.

1 THE COURT: Okay.

2 I know last week I said that I was going  
3 to ask for more legal briefing. I don't think  
4 I need to. I really do think you've briefed  
5 it. If you want it, I'm not going to deny it,  
6 but I'm not going to require it.

7 I'm going to look at -- Attorney Le gave  
8 me a lot of help today when she was referring  
9 me to the various documents and exhibits that  
10 kind of make up the timeline. I'm going to put  
11 them together, assess it. If I'm still  
12 confused, I'm going to ask you to jointly  
13 submit one as one filing, to the extent you can  
14 agree on one. But I'll issue an order if I'm  
15 going to have you do that. I'll just issue it  
16 and give you a deadline.

17 MS. LE: Judge, can I interject right  
18 there?

19 I think that that -- the last Excel  
20 spreadsheet with the 40 tabs that Ms. Brown has  
21 discussed -- we didn't know about that when we  
22 filed our initial response. So Mr. Hunter, in  
23 his surreply, makes a notation about that  
24 situation; but, otherwise, it should be listed  
25 out relatively well -- when our team received

1 things, and what the Bates numbers were, and  
2 what those items are.

3 THE COURT: Surreply was -- probably  
4 170-something?

5 MR. HUNTER: 176.

6 MS. BROWN: I have 174.

7 THE COURT: 174, Donna?

8 MS. BROWN: Yeah.

9 MS. LE: That would have been your --

10 MS. BROWN: Is that ours?

11 MR. HUNTER: Yeah. 176 is --

12 MS. BROWN: Thank you.

13 MR. HUNTER: -- and it's footnote six  
14 where I basically mention that.

15 THE COURT: And that's that last  
16 spreadsheet?

17 MR. HUNTER: Yes.

18 And one thing I will say for the record on  
19 this. In our discovery correspondence with  
20 Mr. Harrington, when this issue of network  
21 scans came up, the Government believed it had  
22 both network scans.

23 And when Tim is asking about it, we told  
24 him, "Here's the Bates number for the two  
25 network scans." So, again, the Government

1 agrees -- or concedes; however you want to put  
2 it -- that this document -- we asked for it.  
3 We should have gotten it. And it should have  
4 been produced.

5 THE COURT: Okay.

6 Attorney Brown, I'm going to put the ball  
7 in your court on one issue. Well, no, I'm not  
8 going to ask for more briefing, except on one  
9 issue, which is remedy. I'm going to give you  
10 one week, Attorney Brown.

11 Is that enough time?

12 MS. BROWN: Yeah. We've actually done  
13 some research on this already, and so we can  
14 address that.

15 THE COURT: Well, let me just put this  
16 down. Today's the 7th; okay? By the 14th, you  
17 can elect a remedy, if I grant the relief.  
18 It's a tough one. Very tough question.

19 But if I grant the relief, what are you  
20 going to want to do? Anything you want to do,  
21 you should tell me the authority for it; okay?  
22 Because I know you've told me last time we met  
23 that you don't think that the Rule 33 remedy is  
24 constitutionally permissible. I get it, and I  
25 don't want to jerk you around, Attorney Brown.



1 I think I'd need a federal court telling  
2 me that the rules of criminal procedure are  
3 unconstitutional on that issue for me to -- I'm  
4 not suggesting it's the only thing I'm thinking  
5 about. But, like, to be persuaded -- I think  
6 it's taking, like you suggested -- but I'll  
7 keep an open mind.

8 MS. BROWN: Well, I think the Government  
9 and I can both agree the law is very sparse on  
10 this issue.

11 THE COURT: So, now, I'll give you a  
12 chance to respond to that. The Government --  
13 you can respond to that. That's a Monday. So  
14 I'll give you until Friday to respond to that  
15 remedy. If you want longer, just make a filing  
16 if you need more time. But I'll say, for the  
17 Government, the 18th on remedy.

18 Look, I don't think I'm inclined to  
19 dismiss this case; okay. I just haven't heard  
20 about egregious conduct by the prosecutors in  
21 this case, remotely, that would justify it.  
22 This strikes me as people doing their jobs in  
23 good faith in an unusual situation, where not  
24 only was the victim's counsel heavily involved,  
25 but also a choice was made, for what appeared

1 to be legitimate reasons, to retain a  
2 professional that had also been retained by the  
3 victim. And it led to some irregularities that  
4 I think might require some relief from the  
5 Court, okay, but not egregious conduct.

6 Now, when I said I was going to put the  
7 ball in your court, Ms. Brown -- I'm just going  
8 to disclose to you, okay, leaving aside what  
9 Mr. Davis said about his opinion about  
10 Mr. Commisso, which he's entitled to, and I  
11 don't have any reason to disbelieve it -- but  
12 I'm not focused on that at all.

13 But in terms of what Mr. Hunter and  
14 Mr. Davis told me about what they remember, I'm  
15 prepared to rely on it as officers of the court  
16 explaining it to me. I realize that memories  
17 can be tested, though. So if you want, I don't  
18 see any shortcoming with them not -- noticing  
19 them up as witness.

20 If you want to examine them, file a  
21 request; okay? But the ball's in your court.

22 MS. LE: Your Honor, obviously, if that  
23 were to happen, there's going to be some  
24 complications where management will have to be  
25 involved; and, potentially, AUSAs would be

1       recused from this matter moving forward once  
2       they've testified as a witness. So that is  
3       something we'll have to bring to the attention  
4       of management, Your Honor.

5           THE COURT: You do that. That said, I  
6       recognize what you're saying, and I'm not  
7       saying I'm granting it. I'm saying I want to  
8       know if there's going to be a request for it;  
9       okay? Like I said, I don't want to leave that  
10      unaddressed so it becomes an issue about the  
11      way this hearing was conducted. I don't want  
12      that loose end untied -- that's my point.

13      Okay.

14           I am prepared to take the representations  
15      of all the attorneys in this case -- counsel of  
16      record -- including Ms. Brown, including you --  
17      I'm prepared to rely on that. I don't need  
18      people to be under oath; okay? I also don't  
19      think, though, for what it's worth, it's  
20      particularly unusual in a case involving an  
21      allegation of prosecutorial misconduct that a  
22      prosecutor has to go under oath. It's  
23      unfortunate, but it's not remotely  
24      unprecedented. But if Ms. Brown wants that,  
25      she'll tell me.

1           And your deadline to do that is the same  
2           deadline as your remedy file; okay, Ms. Brown?

3           MS. BROWN: Yes.

4           THE COURT: Okay. Good.

5           MS. BROWN: Can I just ask one quick  
6           question, Your Honor?

7           You said before that you're not going to  
8           require the parties to file supplemental  
9           pleadings. And there are a couple of issues  
10          that, how do I say -- that came to light during  
11          the hearing that I hadn't really dealt with in  
12          the pleadings, because -- especially as to the  
13          scans and things like that, we really didn't  
14          learn until this hearing how it came about and  
15          who had what.

16          I may want to file a brief pleading to  
17          address that. I promise I won't do anything  
18          repetitive, or issues we've already addressed  
19          here.

20          But if I can do that, would it be the same  
21          deadline?

22          THE COURT: Yeah, same deadline. And it's  
23          like I said before -- I'm not requiring any,  
24          but if anybody wanted to do it, I'm not going  
25          to stop you. And when I get it, I'll give the

1 prosecution a chance to respond, if they want  
2 it.

3 MS. LE: Since we're all here, can I make  
4 a suggestion about scheduling moving forward?  
5 Depending -- based on what the Judge has just  
6 indicated, there's unlikely to be a wholesale  
7 dismissal. So it might be a situation where  
8 the Court -- if you are prepared to schedule a  
9 forfeiture hearing or one of the other  
10 hearings, or address any of the other pending  
11 motions, since we're all here and have our  
12 calendars, we can do that now.

13 THE COURT: No. I appreciate the offer,  
14 but, no. I want to get this resolved. Because  
15 it's not that I don't want to get in mind the  
16 calendar, but if we're just going to move them  
17 again, all it means is work for Charli. And  
18 I'm just not going to create that for no  
19 reason. I mean, I don't know how you do a  
20 forfeiture of sentencing without resolving  
21 this. It's part and parcel. It's all  
22 together.

23 The other motions -- like I know there's a  
24 couple of different motions to compel and for  
25 contempt out there. They're just not front and

1 center for the Court in terms of -- they're  
2 just not front and center for the Court in  
3 terms of getting this issue resolved.

4 There is one issue -- there's a motion. I  
5 know one of my law clerks would fill me in if I  
6 asked them, but there is a motion to compel  
7 involving subpoenas out there.

8 What is that about?

9 MS. BROWN: There's two motions -- a  
10 motion for a Rule 17 subpoena. And the  
11 Government's objected, and Attorney Commisso  
12 has filed an objection.

13 And there's a motion to compel which I  
14 think might also be similar to a motion to  
15 reconsider one of the earlier discovery  
16 requests that was denied, basically saying,  
17 based on evidence that we've received in the  
18 last three, four months, we're making a request  
19 to compel certain documents. So there's two  
20 discovery-related requests out there.

21 THE COURT: But those are for sentencing  
22 and forfeiture; right? Not for this.

23 MS. BROWN: That's correct.

24 THE COURT: And not for the 33 of the 29.  
25 It's for sentencing and forfeiture; right?

## HEARING

263

1 MS. BROWN: That is correct.

2 THE COURT: Okay.

3 Ms. Le, it's not that I don't appreciate  
4 the suggestion to get stuff on the calendar.  
5 But I just don't want to put it on and take it  
6 off again, as I've done way too many times in  
7 this case.

8 Anything else for the Court? All right  
9 then. We are adjourned. I'll await your  
10 filing on or before the 14th, Ms. Brown.

11 (The hearing was adjourned at 4:42 p.m.)  
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## HEARING

264

## C E R T I F I C A T E

I, Molly K. Belshaw, a Licensed Shorthand Reporter for the State of New Hampshire, and Registered Professional Reporter, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the proceeding taken at the place and on the date hereinbefore set forth to the best of my skill and ability under the conditions present at the time. Read and sign was not requested.

I further certify that I am neither attorney or counsel for, nor related to or employed by any of the parties to the action in which this proceeding was taken, and further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.



A handwritten signature in cursive script that reads "Molly K. Belshaw".

Molly K. Belshaw  
RPR, LCR No. 00162